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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

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No. 693.

No. 277.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF  
KANSAS *et al.*, Appellants;

*vs.*

JOHN M. LANDON, as Receiver of The Kansas Natural Gas Com-  
pany, *et al.*

*Filed September 20, 1917.*

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No. 856.

No. 353.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS *et al.*, Appellants,

*vs.*

JOHN M. LANDON, as Receiver of The Kansas Natural Gas Com-  
pany, *et al.*

*Filed February 6, 1918.*

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*Appeals from the District Court of the United States for the  
District of Kansas.*

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## BRIEF OF THE APPELLANTS,

The Public Utilities Commission for the State of Kansas.



## STATEMENT.

This case involves the legality of rates prescribed by the Public Utilities Commission of Kansas for the receiver of the Kansas Natural Gas Company in supplying natural gas to consumers:

(a) As to the compensatory character of the rates.

(b) As to whether local regulation of rates in Kansas and Missouri constitute a burden or restraint on interstate commerce.

The receiver of the Kansas Natural Gas Company operates as a whole a system of pipe lines for the transportation, and, by joint arrangement with the local gas companies, for the sale and distribution of natural gas throughout eastern Kansas and western Missouri, including, with numerous small cities and towns, the larger cities of Kansas City, Mo., Kansas City, Kan., St. Joseph, Mo., and Topeka, Kan.

Under the local laws the receiver, and before his appointment the company, was within the regulatory control of the Public Utilities Commission for Kansas in that state and the Public Service Commission of Missouri, as to its business in Missouri. The original rates of the gas company were fixed by franchise ordinances of the cities, which ordinances, as to rates and other conditions, were accepted and approved by the local distributing companies and the Kansas Natural by contracts entered into between them, with the knowledge of the cities and all parties concerned, as hereinafter more particularly appears.

In 1915 the receiver, desiring to increase the rates then in effect, some of which were lower than the so-called contract or franchise rates, applied to the Kansas Commission for permission to make such change in rates. After extended hearings before the Commission and some litigation in the state courts, the results proving unsatisfactory to the receiver, this suit was brought in the United States district court of Kansas asking for an injunction against the Kansas State Commission, forbidding it from enforcing the rates then in effect as unconstitutional, confiscatory of the property in his control, and void; that the State Commission be commanded to consent to

and approve the putting into force and effect immediately by the plaintiff receiver of reasonable rates and charges. The state commissions of Kansas and of Missouri, the attorneys-general of each state, and all the towns and cities therein supplied with gas by the receiver, as well as the distributing companies engaged in serving the cities, were made parties to the suit. An injunction was asked against all of these, prohibiting them from bringing any suits in any other courts for the purpose of litigating any of the questions involved in this suit, and the cities and distributing companies were asked to be enjoined from enforcing the contract set forth in the petition heretofore mentioned and from interfering with the plaintiff in establishing reasonable rates ordained by competent authority. A temporary injunction was asked for.

It was alleged in the petition that the fixing of rates by the State Commission for the sale and supply of gas under the circumstances of the case constituted an unlawful interference with interstate commerce and a burden thereon. The trial court found that the transactions carried on by the parties to the suit in the transportation, distribution and sale of gas to the consumers in the Kansas and Missouri cities constituted interstate commerce of a national character, over which the exercise of the police powers of the state for the purpose of regulating, burdening or interfering therewith was in violation of the constitution of the United States.

There was a hearing on the application for a temporary injunction before an enlarged court, consisting of Circuit Judge Walter H. Sanborn, and District Judges Ralph E. Campbell and Wilbur F. Booth. This hearing resulted in the issuance of a temporary injunction by the court so constituted, on the condition that the receiver should pay no more upon the principal of the debts of the creditors represented in the suits in which the receiver was appointed, until \$750,000 had been invested in the necessary extension of pipes of the Natural Gas Company and the necessary compressors to enable the receiver to furnish his customers a reasonably adequate gas supply, and that \$500,000 of that amount should be invested within six months after the entry of the decree.

The rates attempted to be put into effect by the Kansas State Commission were found to be noncompensatory and illegal and the Commission was enjoined from putting them into

effect during the pendency of the suit. The receiver was also required to keep accounts showing the excess paid by any customer of the gas company for gas in excess of the amount fixed by the Commission, and the receiver was required to repay to him such amount in case the injunction was finally not sustained.

The date of the interlocutory injunction was June 3, 1916, and the decree and opinion of the court appear in the record at pages 294 and 298, respectively. The final judgment against the Kansas Commission as to the constitutionality of the rate and on the question of interstate commerce was entered April 21, 1917. The opinion appears at page 563 of the record and the decree at page 601. These appellants, the State Commission and Kansas cities, appeal from this decree.

Still later, on August 13, 1917, the case was heard as to the Missouri defendants and the court entered a decree as against them, and a further decree against all of the Kansas defendants, including this appellant. This decree appears at page 621 of the record. In this decree it was found that the business transacted by the plaintiff, to wit, the transportation of natural gas from Oklahoma to Kansas and Missouri and the distribution and sale therein of said gas in said states by plaintiff and distribution companies above mentioned is interstate commerce of a national character and not of a local nature; that certain orders of the Public Service Commission of the state of Missouri suspending and otherwise regulating certain tariffs or schedules of rates applicable to Missouri cities and distributing companies and the threats made by said Commission and the statements made by counsel for the Commission to the court that other similar orders will be entered whenever plaintiff or the distributing companies mentioned shall attempt to establish new schedules of rates, are attempts directly and unduly to burden and regulate interstate commerce, and therefore unauthorized and void. (Rec. 622.)

That the operation of provisions of the state law of Missouri authorizing the Commission to suspend rates, and defer the use of the same by the Commission, constitute the taking of the property of the plaintiff and distributing companies above named without due process of law and without just compensation, and deny to the plaintiff and the distributing companies the equal protection of the law.

It is further held that certain contracts and leases executed by the Kansas Natural Gas Company prior to the appointment of the receiver were not binding upon the receiver. These contracts are enumerated in the decree at page 623 of the record. These contracts constituted practically all of the supply contracts made between the Kansas Natural Gas Company and the distributing companies. These appellants, the Kansas Commission and the cities of Kansas, were enjoined from enforcing the aforesaid supply contracts or rates fixed or referred to therein against the plaintiff, the said distributing companies, and from interfering with the plaintiff or any of said defendant distributing companies in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri, and the defendant distributing companies were permanently enjoined from enforcing the said supply contracts or rates fixed or referred to therein against plaintiff, and from interfering with the plaintiff in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri. These appellants also took appeals from this decree. The assignments of error on both appeals appear at the close of the statement of facts in this brief.

The Missouri State Commission and Kansas City, Mo., each also appeal, as does the Kansas City Gas Company and the Wyandotte County Gas Company, from the judgment and decree rendered jointly against the state commissions and the said gas companies and cities.

#### INTERSTATE COMMERCE.

On the question of interstate commerce the facts constituting the nature of the business transacted were stated by the Kansas supreme court, *State v. Flannelly*, 96 Kan. 372, a case of which more will be said later. The facts as so stated by the supreme court of Kansas were adopted by the district court and all parties as a fair statement of how the business is, in fact, transacted. This follows:

"The gas sold by the receivers is produced in both Kansas and Oklahoma. It is transported from the wells through pipe lines beginning in Oklahoma, entering the state of Kansas near Coffeyville, at which place gas is first distributed and sold to

consumers. The remainder is transported north through pipe lines into which gas from wells in Kansas is conveyed, and the gas from Oklahoma and Kansas is then transported through the same pipe lines and through compressing stations to Independence and north and east throughout this state, and after supplying the consumers in this state it is transported into the state of Missouri, where it is sold to other consumers. After the gas from this state is discharged into the pipe lines with the gas from Oklahoma, it is impossible to distinguish one from the other or to separate one from the other. About 85 percent of the gas sold is produced in Oklahoma, and 15 percent is produced in Kansas. About 60 percent of the gas sold is sold in Missouri and 40 percent is sold in Kansas. The gas sold in Kansas is delivered to the consumer thereof in the several cities by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates charged customers for gas. These distributing companies act as agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers. The gas is consumed as fast as it is sold, and is consumed immediately after passing through the meter measuring the gas to consumers." (Rec. 1113.)

The argument upon the question of interstate commerce will be based upon this statement of fact in connection with certain facts concerning the history of the companies and the manner in which they accepted the local franchises and entered upon and carried out the business of distributing gas. This and other considerations make it necessary that a complete history of the company be embodied in the statement of facts. The statement which we here adopt is the one contained in the opinion of the district court, and has been adopted by all parties to the suit as a succinct, carefully made and correct history of the company (rec. 1074-1084):

## HISTORY OF THE KANSAS NATURAL COMPANY AND ITS PROPERTY.

The company was organized under the laws of the state of Delaware in April, 1964, with a capital stock of \$6,000,000. In July, 1905, it obtained a license to do business in the state of Kansas. The principal business of the corporation was the production and sale of natural gas, but it was authorized under its charter to purchase the stock, business and property of other corporations. Its first gas fields were located in the state of Kansas. Prior to 1912 the company had, by purchase and consolidation with other companies, largely increased its initial holdings. It had by means of various contracts undertaken to supply gas through distributing companies to more than thirty cities in the state of Kansas, as well as certain cities in the state of Missouri, including the cities of St. Joseph and Kansas City, Mo. These contracts were of various types, but, generally speaking, covered a considerable period of years, and provided for increases in the rates at certain fixed dates. They provided further for a division of the price paid by the consumers between the distributing company and the Kansas Natural Gas Company, generally on a basis of one-third to the distributing company and two-thirds to the Kansas Natural Gas Company.

The character of these franchises and contracts and the rules provided for therein appear in Exhibit B to plaintiff's bill, and Exhibits A to E, inclusive, of the amended and supplemental answer of L. G. Treleaven, receiver of Consumers Light, Heat and Power Company—the same being typical of each of said contracts and franchises.

For the purpose of completing its lines to Kansas City, Mo., the company had caused to be incorporated the Kansas City Pipe Line Company, and became owner of 50 percent of the stock of said company, the other 50 percent being owned by the United Gas Improvement Company. Shortly thereafter, in November, 1906, the Kansas City Pipe Line Company leased to the Kaw Gas Company (a subsidiary corporation of the Kansas Natural Gas Company), all of its property for ninety-nine years. In place of this lease a new lease was substituted between the Kansas City Pipe Line Company and the Kansas Natural Gas Company in January, 1908.

For the purpose of extending its pipe lines into Oklahoma, the Kansas Natural Gas Company had caused the incorporation of the Marnett Mining Company, and through stock ownership controlled said last-named company. Two issues of bonds had been made by the Kansas Natural Gas Company: First mortgage series and second mortgage series; and one by the Kansas City Pipe Line Company and one by the Marnett Mining Company. The properties of the three mentioned companies were operated as a unit, and included a continuous pipe line from the fields in Oklahoma to the two Kansas Cities, with other lines extending to various cities in Kansas and Missouri. The company during the year 1912 was supplying natural gas to approximately 150,000 households, and selling for household and industrial uses upwards of 28 billion cubic feet of gas per annum.

The financial operations of the company, including its requirements of leaseholds for the purpose of gas production, were as follows:

That in 1903 R. M. Snyder and associates formed a copartnership, known as the New York Oil and Gas Company, and acquired nearly 18,000 acres of gas leases, upon which they developed a supply of gas and secured a franchise to use the streets and alleys of Independence, Kan., to supply gas to the citizens thereof. During the same year said Snyder and associates obtained from the Consolidated Gas, Oil and Manufacturing Company and the Independence Gas Company, corporations then owning a plant for the sale and distribution of gas in the city of Independence, an option to buy said plant in Independence and some 80,000 acres of leases located principally in the counties of Montgomery and Chautauqua, in Kansas, paying for said option the sum of \$10,000. The full purchase price for said property was to be \$550,000. During the same year R. N. Barnsdall and James O'Neil acquired about 90,000 acres of leases and brought in some producing gas wells thereon, located principally in Allen, Neosho, Wilson and Labette counties, Kansas, and organized the Kansas Natural Gas Company.

In 1904 the said Barnsdall and Snyder and their associates consolidated their propositions and increased the stock of the Kansas Natural Gas Company from \$6,000,000 to \$12,000,000, and each group of associates transferred to the Kansas Nat-



ural Gas Company their various properties herein enumerated; the said Barnsdall and associates received for their property \$6,000,000 of the capital stock of the Kansas Natural Gas Company, and Snyder and his associates received the remaining \$6,000,000 of said capital stock. Said Snyder and associates received in addition thereto the sum of \$900,000 in money, \$540,000 of which was to be devoted to the payment of the balance of the purchase price of the properties of the Independence Gas Company and the Consolidated Gas, Oil and Manufacturing Company; that the \$900,000 paid to Snyder and his associates was realized from the sale of the first mortgage bonds of the Kansas Natural Gas Company.

On these leases there were 32 oil and 132 gas wells, all producing. When the original contract was made these leases were producing 400,000,000 cubic feet a day from the Snyder leases and by April 15, 1904, the production had increased 24,900,000 cubic feet on the Snyder leases and 221,923,000 cubic feet on the other leases. The leases transferred for stock have produced in ten years about \$24,000,000 gross, the cost of producing being very considerable. The present leaseholds are carried on the balance sheet of the company at \$1,670,370. They may be worth nothing to-day and \$100 an acre to-morrow, depending on business developments. A good deal of this acreage was beyond reach of the Kansas Natural lines. These leaseholds were valued by the engineer for the Commission in 1915 at \$1,126,359.34.

That the Kansas Natural Gas Company thereafter acquired other leases, all of which said leases cost the Kansas Natural Gas Company not to exceed \$4,100,000, and said sum included the value of all materials used in the wells. The Kansas Natural Gas Company had two mortgage bond issues on its property, a first-mortgage bonds of \$4,000,000, which was sold at par, and a second-mortgage bonds for \$4,000,000, which sold for \$750 per share of the par value of \$1000. These two bond issues of the Kansas Natural Gas Company were secured by a mortgage on all the property of the company then owned or afterwards acquired.

When the Kansas City Pipe Line Company was organized, with a capital stock of \$4,500,000, the bonds of this company were issued in the sum of \$4,745,000. All the bonds of this company were bought by the United Gas and Improvement



Company of Philadelphia. The stock of the Kansas City Pipe Line Company represented no value above the bonded debt. The Marnett Mining Company was organized to extend the pipe lines of the company farther south into Oklahoma. All the lines of the Marnett Mining Company are located in the state of Oklahoma. So it will be seen that the Kansas City Pipe Line Company and the Marnett Mining Company have always been, in fact, subsidiary companies to the Kansas Natural Gas Company, and the property of the three companies is one contiguous whole, all used in producing and transporting gas from the Mid-Continent gas fields to the consumers within the states of Kansas and Missouri, and all this property is in the possession of and is operated by the receiver. The following table shows the amount of capital stock and bonds issued by each of these three companies:

<i>Kansas Natural:</i>	
Common stock .....	\$12,000,000
First-mortgage bonds .....	4,000,000
Second-mortgage bonds .....	4,000,000
<i>Kansas City Pipe Line Company:</i>	
Stock .....	4,500,000
Bonds .....	4,745,000
<i>Marnett Mining Company:</i>	
Stocks .....	2,500,000
Bonds .....	2,000,000
	<hr/>
	\$33,745,000

The statement shows that these companies have issued bonds of the face value of \$14,745,000, for which they received \$13,404,250. Of this amount \$1,035,000 was invested by the Kansas Natural Gas Company in the bonds of the Marnett Mining Company, leaving a balance of \$12,269,250 outside money actually received from the sale of said bonds.

The table on page 20 is a statement prepared by the accountant for the Commission after an examination of the books of the receiver to show the investment and property at the close of each year, together with the accrued depreciation and net investment, and divided as between transportation and production property, columns 2 and 3 being his deductions and conclusions from the data drawn from the books of the receiver and the valuation placed upon the property by the engineer for the Commission. All of the money invested in the

property after the organization of the Kansas Natural had been perfected was derived either from the sale of the bonds or from earnings. (For this table, see Record, 1078.)

The Kansas Natural Gas Company had, however, in acquiring its properties and extending its system, violated the anti-trust statute of the state of Kansas; and in January, 1912, suit was begun in the district court of Montgomery county, Kansas, by the attorney-general of the state of Kansas against the Kansas Natural Gas Company, the Independence Gas Company, and the Consolidated Gas, Oil and Manufacturing Company; amongst other relief prayed for was the ousting of the defendants from the exercise of certain corporate powers within the state, and the appointment of receivers. The case was heard, and resulted, so far as the Kansas Natural Gas Company was concerned, not in a complete ouster, but in the appointment of receivers, one of them being the plaintiff in the present suit, the order being filed February 17, 1913. Said receivers were to "manage the corporate property and business of the said defendant until the perversion and abuses of privileges by said defendant are corrected so as to protect the rights of all parties, especially all the gas consumers of the defendant company, and all parties interested in the property of the Kansas Natural Gas Company, whether as bondholders, trustees of bondholders, distributors of gas or otherwise."

Meanwhile, in October, 1912, a suit (No. 1351 Equity) was commenced in United States district court for the district of Kansas by John L. McKinney, a stockholder and a bondholder of the Kansas Natural Gas Company, alleging the insolvency of said company, and praying the appointment of receivers to take possession of and manage its property and assets. On October 9, 1912, Eugene Mackey, Conway F. Holmes and George F. Sharritt were appointed receivers. They immediately took possession of the property and began carrying on its business.

On February 3, 1913, another suit (No. 1-N Equity) was commenced in the United States district court for the district of Kansas by the Fidelity Title and Trust Company, trustee under the first mortgage of the Kansas Natural Gas Company, to foreclose said mortgage; and on the same date the receivership theretofore existing in the McKinney suit was extended to

the Trust Company suit, and the same persons were appointed receivers in the latter suit.

Immediately after the appointment of the receivers in the state court, and acting under the suggestion of that court, the attorney-general of the state of Kansas and the receivers appeared in the federal court and urged the prior jurisdiction of the state court, and prayed the federal court for an order directing its receivers to turn the property of the Kansas Natural Gas Company over to the receivers appointed by the state court. Litigation followed which finally resulted in all of the property of the Kansas Natural Gas Company, whether located in the state of Kansas, Missouri or Oklahoma, being turned over by the federal court to the two receivers of the state court, for the purpose of managing the property and carrying out of the decree of the state court in the antitrust suit above mentioned. The history of this litigation may be found in 206 Fed. 772, 209 Fed. 300, and 217 Fed. 187. In the last-mentioned case the court in its opinion said: "The court below (United States district court for the district of Kansas) has the right to retain the foreclosure suit and await the progress and disposition of the action in the state court, with power to make such orders and decrees as future exigencies may require."

On January 9, 1915, the United States district court for the district of Kansas made an order appointing John M. Landon, the present plaintiff, ancillary receiver of the federal court for the properties located in Missouri and Oklahoma. At the present time John M. Landon is the sole receiver of the state court, and is ancillary receiver of the federal court, and George F. Sharritt is receiver under the federal court in the McKinney and Fidelity Trust Company suits, the other receivers having either died or resigned.

By chapter 238 of the Laws of 1911 of the state of Kansas there was established the Public Utilities Commission for the state of Kansas, and with control over the public utilities and common carriers doing business in the state. Included under the term "public utility" were companies operating plants for the conveyance of oil and gas through pipe lines, also the lessees and receivers thereof. By said act it was provided that the rates charged by public utilities should be published and filed with the Public Utilities Commission. It was further

provided that said Commission, either upon complaint of parties or upon its own initiative, should have power to investigate such rates, and fix and order substituted therefor other rates if found necessary. It was further provided that unless the Commission should otherwise order, it should be unlawful for any public utility to collect a greater rate than that fixed on the lowest schedule of rates for the same service on the first of January, 1911.

The federal court, shortly after the appointment of its receivers in 1912, established a schedule of rates to be charged by the receivers, but this schedule was shortly thereafter suspended by the same court.

In January, 1913, application by the attorney-general of Kansas was made to the Public Utilities Commission to cause an investigation to be made and to fix rates to be charged by the receivers of the Kansas Natural Gas Company. The receivers and numerous distributing companies appeared and asked for changes in the then existing rates. In July, 1913, the Commission made its order denying any increases in rates, and approving and confirming the rates then in effect.

Upon a further hearing in July, 1913, the Commission directed the receivers to make certain extensions of the pipe lines into the Oklahoma field, and thereupon the receivers applied to the federal court for directions as to their duties in respect to this order. Upon a hearing the receivers were directed not to comply with the order of the Commission. (See 219 Fed. 614.) This application and order, it will be noticed, were made prior to the time when the federal court turned over to the receivers of the state court all of the property of the Kansas Natural Gas Company. This was not completely effected until September, 1914.

In December, 1914, various of the parties before the court in district court of Montgomery county in the suit brought by the state of Kansas (No. 13,476), after consideration and investigation, entered into an agreement known as the creditors' agreement, covering certain phases of the financial management of the property of the Kansas Natural Gas Company, while the same should be in the hands of receivers and under the control of the state district court.

This creditors' agreement took the form of a stipulation filed in the state district court in case No. 13,476. It provided,

among other things, for the scaling down of the outstanding stock of the Kansas Natural Gas Company from \$12,000,000 to \$6,000,000. It also provided for the scaling down of certain of the issues of bonds above mentioned. It recited that the opinion of experts after investigation was that the life of the gas field would be six years. It, therefore, provided for the payment of the several bond issues during such period. It provided payment out of earnings for extensions which would be necessary during such period, if the property should be operated at compensatory rates. It provided that application might be made, with the consent of the state court, to the Public Utilities Commission or other public authority when deemed advisable by the state court. It provided that creditors and lien holders should defer their rights of foreclosure or assertion of liens during the above mentioned period, provided the agreement was being carried out, subject, however, to the order of the court. This agreement was consented to by the Kansas Natural Gas Company and its auxiliary companies, by the receivers, by the great majority of the bondholders of the several companies, and by the state of Kansas through its attorney-general.

This instrument appears as Exhibit A of the plaintiff's bill of complaint.

In April and May, 1915, the receivers, by direction of the district court of Montgomery county, filed a petition with the Public Utilities Commission requesting the Commission to establish a schedule of joint rates for the distribution and sale of gas by the complainants and the respondents distributing companies. The schedule proposed by the receivers represented a decided advance in rates from the 25-cent rate then in force, and ranged 20, 25, 30, 35, 37, 40 and 45 cents, according to the location of the cities served, distance being one of the elements recognized. A large amount of testimony was taken, and the Commission filed findings July 16, 1915, to the effect that the rate ought to be raised in all markets where the price was 25 cents per thousand cubic feet to the flat rate, 28 cents. Included in the evidence before the Commission at that time was the creditors' agreement, and the findings of the Commission were based, to some extent at least, upon the estimates and figures found in the creditors' agreement. No order was,

however, made by the Commission at this time, and the reason given is stated by the Commission itself as follows:

"It developed upon the hearing that more than half the natural gas supplied and marketed by complainants is sold in the state of Missouri. It is conveyed, by means of pipe lines passing through Kansas, to Joplin, Kansas City, St. Joseph and other cities in our sister state. It would be manifestly unfair to permit complainants to advance the price of gas to their Kansas patrons unless a corresponding increase were made to consumers in Missouri. It is conceded that an advance in Kansas without a similar one in Missouri would be unavailing for the purposes contemplated by complainants, and they do not desire any advance in Kansas except as it may be simultaneous with a corresponding one in Missouri.

"The Commission, therefore, awaits the pleasure and action of the rate-regulating body or bodies of Missouri having jurisdiction of the subject matter; and if in that state proper and necessary orders be issued establishing a schedule of rates as herein outlined, an order, effective, if possible, simultaneously, will be issued by this Commission in accordance with the views herein expressed."

Shortly after this decision the receivers filed in the district court of Montgomery county an application for an injunction restraining the Public Utilities Commission from putting into effect the joint rate proposed in their findings of July 16, 1915. Service having been attempted to be made upon the Commission and the members thereof, special appearance was made on their behalf, and a motion made to quash the summons and the service thereof. Said motion being overruled, a demurrer was interposed by the Commission, also challenging the jurisdiction of the state court. The demurrer was overruled, and the Utilities Commission elected to stand upon its demurrer. Thereupon testimony was introduced on behalf of the receivers, and on the 27th of August, 1915, the state district court entered its findings to the effect that the 28-cent rate was unreasonably low and not sufficient to carry out the requirements of the creditors' agreement; and authorized a 30-cent rate to be temporarily established. The court also expressed the opinion that the receivers were engaged in interstate commerce; and furthermore entered an order enjoining the Public Utilities Commission from putting into effect the

rates proposed by it in its findings of July 16, 1915. An appeal to the state supreme court was taken by the Utilities Commission from the order overruling the demurrer above mentioned. Meanwhile, on August 17, 1915, the Public Utilities Commission filed in the state supreme court an application for an alternative writ of mandamus against the judge of the district court of Montgomery county and the receivers of the Kansas Natural Gas Company, praying that said judge be directed to vacate and set aside the order making the Public Utilities Commission a party defendant to the injunction suit; also to set aside the temporary restraining order; and also to dismiss the suit itself; and also that the receivers be compelled to perform their legal and public duty.

An answer was interposed by the receivers in the mandamus proceedings. These two matters, the appeal of the Public Utilities Commission from the order of the state district court overruling their demurrer, and the mandamus proceedings brought by the Public Utilities Commission in the supreme court, were heard together in that court. On October 4, 1915, the order of the district court overruling the demurrer was reversed, the supreme court holding that no jurisdiction had been obtained over the Commission. The writ of mandamus was denied, the court holding that inasmuch as the Commission had made no order a writ of mandamus could not properly issue. The court concluded its opinion as follows:

"The demurrer of the Public Utilities Commission to the receivers' petition is sustained, and the injunction against the Commission is set aside. No writ of mandamus will issue at this time. The action in this court is dismissed as to Honorable Thomas J. Flannelly, but is retained as to the defendants John M. Landon and R. S. Litchfield for such orders and judgments as may be hereafter made." (96 Kan. 372.)

October 7, 1915, the receivers filed with the Public Utilities Commission a petition for rehearing. Further testimony was introduced and the entire matter was considered *de novo*. December 10, 1915, the Commission filed its findings and order; again finding that 28 cents, with certain exceptions, was a sufficient rate, and authorizing such a schedule to be filed. December 28, 1915, the receivers filed the authorized schedule, which was approved on the same day, and thereafter, on December 29, 1915, the receivers, by direction of the district



court of Montgomery county, filed the bill of complaint in this court in the present suit, said suit being designated 136-Equity.

On the 3d day of January, 1916, the Public Utilities Commission presented an application in the mandamus proceeding above referred to, asking the state supreme court for an injunction restraining the receivers from prosecuting the present suit in the federal court. On January 7, 1916, the receivers filed a petition for removal of the mandamus proceedings from the state supreme court to the federal court. On the 3d day of January, 1916, the Public Utilities Commission also filed a supplemental petition in the mandamus proceedings, asking that the receivers be compelled to perform their official duties and furnish their customers efficient and sufficient service.

On January 16, 1916, the state supreme court filed a decision denying the petition of the receivers for removal, denying the petition of the Public Utilities Commission for an injunction, and dismissing the mandamus proceedings. (96 Kan. 833.)

The bill of complaint in the present suit, 136-N, alleges that it is dependent upon and ancillary to the suits above mentioned pending in this court, the McKinney suit No. 1351 and the Trust Company suit No. 1-N Equity.

It appears that the rate in Montgomery county prescribed by the Commission in its order of December 10, 1915, was called to the attention of the state district court shortly after the rates were promulgated, and the district court, upon application of certain cities in Montgomery county, enjoined the receivers from collecting in those cities the rates authorized by the order of the Commission of December 10, 1915. To this proceeding the Commission was not a party. It is admitted by the plaintiff that the rate that has been charged in Montgomery county since the order of December 10, 1915, has been 20 cents at all times and that is the rate now. The record shows that the rates in question in Montgomery county were competitive rates, and it does not appear that gas could have been sold in that territory by the receiver at a rate higher than 20 cents, the rate then in force; nor does it appear that if the gas had been brought to Kansas City and sold at 28 cents there would have been any greater profit for the receiver than by selling it in Montgomery county at 20 cents. Finally, it appears that the



rate in Montgomery county prescribed by the Commission in its order of December 10, 1915, was called to the attention of the state district court shortly after the rates were promulgated, and the district court upon application of certain cities in Montgomery county enjoined the receivers from collecting in those cities the rates authorized by the order of the Commission of December 10, 1915.

### **DIVISION OF RATE BETWEEN RECEIVER AND DISTRIBUTING COMPANIES.**

It is to be noted that the 28-cent rate fixed by the Commission was a joint rate; that is, a rate covering both the compensation to the receiver and to the distributing companies, which joint rate was to be paid by the ultimate consumer. Under the contracts made by the Kansas Natural Gas Company with the various distributing companies, a division of the rate to be paid by the ultimate consumer was provided for, which division was generally two-thirds to the Kansas Natural Gas Company and one-third to the distributing company, although, in a few instances, this proportion was different; in the two Kansas Cities it was 62½ percent to the Kansas Natural.

These contracts between the Kansas Natural and the various distributing companies were never adopted by the receivers appointed by the state court, and the order of the federal court, appointing the original federal receivers, provided that these contracts should not become binding upon the receivers, except by the express order of the court. No such order has ever been made. The receivers, however, continued to distribute gas to the various distributing companies, and to collect therefor upon the ratio of the division of rates fixed by the contracts.

At the hearing before the Public Utilities Commission it was assumed that any joint rate fixed by the Commission would be divided between the receiver and the distributing companies upon the same basis, namely, two-thirds and one-third. At the hearing before the enlarged court, upon the application for a preliminary injunction, the same assumption was made. When the case came on for final hearing, however, the attorneys for the Commission took the position that the assumption would no longer be acquiesced in by the Commission, and that the basis of rate-making had been changed by the position taken by the receiver, under the direction of the district court of

Montgomery county, to the effect that he would no longer deliver gas on that basis. Under the view taken by the trial court, this left the question open whether the receiver could reasonably expect to secure a greater percentage of the joint rate fixed by the Commission than the two-thirds, and it became necessary to determine this question, because, even though it might be established that two-thirds of a 28-cent rate would be confiscatory to the receiver, it would not follow that five-sixths or seven-eighths would be confiscatory. In the absence of an assumption that two-thirds was all that could be obtained, evidence was required as a basis for a finding with regard to the matter. Accordingly, considerable evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating expenses, and other allied matters. This evidence was introduced, not for the purpose of ascertaining with accuracy what would be a just and fair rate to be charged by the various distributing companies, but solely for the purpose of ascertaining whether there was any reasonable grounds for holding that the receiver could obtain more than two-thirds of the 28-cent joint rate. This evidence was taken and the inquiry made on the basis of laying aside temporarily the contracts between the Kansas Natural Company and the distributing companies, and without undertaking to pass upon the validity of those contracts as between the original parties.

In a number of the cities in northern Kansas, after the temporary injunction, the receiver demanded 18 cents per thousand feet at the gates of the city, and at others on the southern trunk he demanded 16 cents.

#### **THE ANNUAL REQUIREMENTS OF THE GAS COMPANY AND ITS PROBABLE RECEIPTS AND DISBURSE- MENTS.**

The Commission, in its decision of December 10, 1915, presented a table showing its estimate of the requirements of the receiver for the year 1915, and the estimated revenue under the 28-cent rate. The table follows:

TABLE No. 5, KANSAS NATURAL GAS COMPANY.

*Statement of estimated revenue and requirements for the ensuing year, based on 1914 figures, revised as previously explained, for the State of Kansas.*

	Requirements.	Transportation.	Kansas.
25,671,445 M. cubic feet gas at 4c.....		\$1,026,857.80	\$514,045.01
Operating expenses and taxes assigned to transportation .....	510,536.14		223,245.11
Receivership expenses .....	32,228.00		14,093.30
Uncollectible gas accounts .....	12,555.07		6,359.14
Taxes, Kansas City Pipe Line.....	32,288.27		16,860.51
Taxes, Marnett Mining Company.....	10,497.35		5,316.91
Maintaining organization, Marnett Mining Co. ....	690.20		349.59
Total .....		\$1,626,652.83	\$780,269.57
Present value of transportation property, \$7,083,605.64; depreciation on basis of 12 years .....	590,300.00		268,468.44
Requirements, exclusive of a return on property investment .....	2,216,952.83		1,048,738.01
*Return on present value, \$7,083,605.64.			
Add for working capital, \$200,000.			
Total .....		\$437,016.35	\$198,755.00
		\$2,653,969.18	\$1,247,493.01
<i>Estimated Revenue.</i>			
Gas sales, 1914.....			\$1,192,089.82
**Gas used in compressor stations (on basis of use) .....			31,737.70
Total .....			\$1,223,827.52
Estimated revenue from increased rates.....			171,513.63
Total estimated revenue from Kansas.....			\$1,395,341.15
Deduct requirements as above.....			1,048,738.01
Estimated net revenue .....			\$346,503.14
Which is equal to a return of 10.46% on the present value, \$3,312,583.83, which is 45.48% to Kansas of the total of \$7,283,605.64 or total estimated revenue for Kansas....			1,395,341.15
Less requirements, including a 6% return.....			1,247,493.01
Surplus .....			147,848.14

\* The division of these items between Kansas and Missouri has been made on basis of use of property as shown in Table No. 1.

\*\* This item is placed here to balance an equal sum included in the expenditures. It is a bookkeeping entry solely.

**POSITION OF THE APPELLANT COMMISSION AND  
CITIES OF KANSAS, DEFENDANTS IN THE COURT  
BELOW.**

**Interstate Commerce.**

*Assignments of Error V, VI, Record 605.*

(a) These appellants deny that the receiver of the Kansas Natural Gas Company is engaged in interstate commerce in Kansas, and deny that the circumstances set forth in the afore-said statement of facts constitute interstate commerce of a national character, so far as the sale and delivery of natural gas at the meter tips of the consumers is concerned.

(b) That when the Kansas Natural Gas Company accepted, through its agents and partners in business, the distributing companies, the local franchises granted by the cities of Kansas to furnish and distribute locally natural gas to the consumers thereof within said cities under the local laws and police regulations of the state, both its production and transportation of gas was entirely intra-Kansas. Its authority to transact business and its agreement and contract to do so relate solely to intrastate commerce, and its agreement resulting from said franchises and contracts was to engage in the domestic production, transportation and sale of natural gas for the purposes named in the franchises to the local consumers thereof. These transactions constituted an irrevocable contract as to its intentions concerning its business in Kansas. This operates as an estoppel from which the company has never been relieved by the consent of the state or any of its agencies in state government.

(c) The enlargement or widening of the business of the company at a later date to the end that it produced in and transported from the state of Oklahoma large quantities of gas, varying from a small percentage at first to a large percentage at the present time of its entire product, does not relieve it from the effect of the estoppel mentioned in paragraph (b) and does not prevent the state of Kansas from exercising its police power in regulating and controlling the business of the company under its original arrangement with the company for the transaction of business within the state and the exercise of local franchises by it under the state government.

(d) A considerable portion of the gas still produced and distributed in Kansas by the Kansas Natural Gas Company is produced in Kansas, and the gas from without the state is mixed with it, in some cases in the pipe lines of the company, and the local consumers supplied from these pipe lines. This constitutes an intentional intermingling of the property of the company transported from another state with the general property of this state and deprives the entire mass of property controlled by it of its interstate character.

(e) It follows from the statement in paragraph (d) that the state of Kansas must be protected in its right to exercise police control and regulation over at least the sale of the gas produced, transported, sold and distributed for use wholly within the state of Kansas.

(f) The production, transportation, sale and distribution of natural gas to consumers within the state under local franchises held by the producing and transporting company or its agencies, if partaking of the nature of interstate commerce, is not interstate commerce of a national character, subject to natural control alone, without the interference or control of the state government, when Congress has not acted as to the control of such commerce.

(g) The question of whether the transaction of the business of the receiver in this case constituted interstate commerce had been adjudicated between the parties to this case by the judgment rendered by the supreme court of Kansas in the case of *In re Flannelly*, 96 Kan. 372 (Rec. 174-177), and also in the prior proceedings and trial in the case of *State of Kansas, ex rel. John S. Dawson, Attorney General, v. The Kansas Natural Gas Company*, in which case the Kansas Natural Gas Company was adjudged guilty of violating the local antitrust laws of the state of Kansas and the receiver who brought this action appointed to take charge of its property because of said offenses against the local laws of the state of Kansas; and again in the case of *John L. McKinney et al. v. The Natural Gas Company*, No. 1351, and *Fidelity Title & Trust Co. v. Kansas Natural Gas Co. et al.*, No. 1-N, In Equity, the cases in which the receiver now acts and controls the property in controversy, in a proceeding or petition made by the receiver of the said state court to the United States district court for the purpose of recovering the control and management of the physical property

of the Kansas Natural Gas Company; that in said proceeding the issue as to whether the receiver and the Kansas Natural Gas Company were engaged in intrastate commerce was tendered by the receiver and issues formed thereon by the parties to said suit, namely, the Fidelity Title & Trust Co. and John L. McKinney, plaintiffs in said suit, and it was there determined by the court that the receiver, and the Kansas Natural Gas Company through him, were engaged in intrastate commerce subject to the control of the police power of the state of Kansas, 206 Fed. 772 (Rec. 179). That this case was appealed to the circuit court of appeals of the eighth circuit and there affirmed in 209 Fed. 300. (Rec. 180.) (Assignment of Error as to paragraph IX, Rec. 606.)

#### **Want of Equity in the Plaintiff's Bill.**

*Assignments of Error, I, II, III, Rec. 604, 605.*

The appellant Commission and cities of Kansas deny that there was any ground for equitable relief stated in the plaintiff's bill or shown in the evidence in this case.

It was conclusively shown that the plaintiff receiver had an adequate remedy at law in suits pending at the time he began his case in this court and that he secured the dismissal of the cases in the law courts by misrepresentation of facts and want of good faith.

#### **The Rates Provided by the Kansas Commission December 10, 1915, Attacked by the Plaintiff's Bill, Were Compensatory and Not Subject to the Plaintiff's Charge That They Were Confiscatory or Unconstitutional.**

(a) That the rates in effect under the rate order of the Commission of December 10, 1915, were higher than those provided for in the franchises under which the Gas Company began business, except in the city of Topeka, and produced a larger income on the system as a whole, including Topeka, than would the franchise rates. That the company could not, therefore, complain in equity that such rates were confiscatory or unreasonable. (Assignment of Error XI. Rec. 607.)

(b) That allowances for betterments or extensions of the pipe lines of the company should not have been charged to

maintenance or allowed for in the usual annual operating expenses of the receiver. (Assignment of Error IX, Rec. 607.)

(c) That the findings as to the life of the property should not have been based upon the probable life of the gas field in Kansas or Oklahoma. (Assignment of Error VIII, Rec. 606.)

(d) That the findings of the Commission as to the price of gas purchased in Oklahoma by the receiver and the rate of income to which he was fairly entitled on the property employed in the business by him were supported by the evidence, and the conclusions of the district court thereon are erroneous. (Assignment of Error VII, Rec. 606. Assignment of Error XI, Rec. 607.)

## ASSIGNMENTS OF ERRORS.

No. 817.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS—FIRST DIVISION.

In Equity. No. 136-N.

JOHN M. LANDON, as Receiver of the Kansas Natural Gas Company,  
*Plaintiff,*

*vs.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS  
*et al., Defendants.*

**Assignment of Errors on Behalf of the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel, and C. F. Foley, Members of the Public Utilities Commission for the State of Kansas, and H. O. Caster, Attorney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney-general of the State of Kansas.**

And now come Joseph L. Bristow, John M. Kinkel and C. F. Foley, commissioners of the Public Utilities Commission for the state of Kansas, for the Public Utilities Commission for the state of Kansas, and H. O. Caster, attorney for said Commission, and S. M. Brewster, attorney-general of the state of Kansas, appellants, and make and file this their assignment of errors in their appeal herein :



## I.

The district court of the United States for the district of Kansas erred in holding that the sale and distribution of gas in the manner in which the complainant receiver was engaged therein within the states of Kansas and Missouri constituted interstate commerce and the engagement therein by the complainant receiver in the transactions involved in said case, and that the acts and conduct of said receiver involved in the transportation and sale of said natural gas to his patrons in the towns and cities of the states of Kansas and Missouri, and in other places therein, constituted interstate business, and that the said business of transporting and selling natural gas to his patrons in the states of Kansas and Missouri was not subject to the control of the Public Utilities Commission of the state of Kansas or the Public Service Commission of the state of Missouri within their respective states and under the local laws of the said states.

## II.

That the said United States district court for the district of Kansas erred in the court below in holding that the contracts entered into between the various distributing companies located in Kansas were not binding upon the complainant receiver.

## III

The United States district court for the district of Kansas erred in the court below in enjoining the Public Utilities Commission for the state of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, as the Public Utilities Commission for the state of Kansas, and H. O. Caster as attorney for the Public Utilities Commission for the state of Kansas, and S. M. Brewster as attorney-general of the state of Kansas, and the defendant cities in Kansas, from enforcing the aforesaid supply contracts or rates fixed or referred to therein against said complainant receiver and said distributing companies, and from interfering with the plaintiff or any of said defendant distributing companies in establishing and maintaining such rates as the said court had approved or might thereafter approve for consumers of natural gas in the state of Kansas.



## IV.

The United States district court for the district of Kansas erred in the court below in enjoining the mayors and common council and governing officials, city attorneys, city counselors, or representatives of the defendant cities, and their successors in office from commencing, instituting, or prosecuting in any other court or tribunal any suit or proceeding to litigate any matters determined by the United States district court for the district of Kansas without leave of said court first having been obtained.

F. S. JACKSON,

H. O. CASTER,

*Attorneys for Appellant.*

Filed in the district court this November 8, 1917.—MORTON ALBAUGH, *Clerk.*

No. 817.

**Assignment of Errors on behalf of the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel, and C. F. Foley, Members of the Public Utilities Commission for the State of Kansas, and H. O. Caster, Attorney for the Public Utilities Commission for the State of Kansas.**

And now come Joseph L. Bristow, John M. Kinkel and C. F. Foley, commissioners of the Public Utilities Commission for the state of Kansas, for the Public Utilities Commission for the state of Kansas, and H. O. Caster, attorney for said Commission, appellants, and make and file this their assignment of errors in their appeal herein:

## I.

The district court of the United States for the district of Kansas erred in refusing to dismiss the bill of complaint in this action in said court for the reason that said court had no jurisdiction of said case.

## II.

The said district court erred in refusing to direct the dismissal of said complaint for the reason that it appeared from said complaint and upon the record therein that a suit in which all of the matters sought to be drawn in controversy by said

complaint were involved was pending in the supreme court of the state of Kansas at the time of the filing of said bill of complaint by the complainants therein, and that complainants had not and did not fully pursue the remedies available to them in said suit in the supreme court of the state of Kansas before filing the bill of complaint in the district court of the United States, and that the bill of complaint was defective and void for want of equity for said reasons.

### III.

That the United States district court for the district of Kansas erred in not giving judgment for these defendants in the court below, now appellants, for the reasons mentioned in the foregoing assignment numbered II, upon the evidence adduced by the parties and the record in the final trial of said case.

### IV.

That the United States district court for the district of Kansas erred in the *case* below in granting a temporary injunction in said cause as against these defendants, now appellants, on the ground that the rate fixed by the Public Utilities Commission for the state of Kansas for the distribution of gas by the complainant receiver to its patrons in the cities, towns, or other places in the state of Kansas was confiscatory and in violation of the constitution of the United States, in that the observing and putting into effect of said rate for the distribution of natural gas would amount to the taking of the property of the complainant receiver and the estate under his charge and control without due process of law and without compensation.

### V.

The United States district court for the district of Kansas erred in the court below in giving judgment in favor of the complainants, now appellees, and against the appellants, in the final trial of said cause upon the evidence adduced and the record, for the reason given by the court that the rates fixed by the Public Utilities Commission for the state of Kansas for the distribution of natural gas to the patrons of the complainant receiver in the cities, towns and other places in the state of Kansas were confiscatory and in violation of the constitution of the United States, and that the putting into effect of said rates would amount to the taking of the property of the said com-

plainant receiver without due process of law or compensation, in violation of the constitution of the United States, and that said rates were unreasonable and arbitrary and were unreasonably and arbitrarily fixed by the appellant Commission in violation of law and the constitution of the United States, when judgment should have been rendered in favor of these appellants.

#### VI.

That the said United States district court for the district of Kansas erred in the court below in holding that the sale and distribution of gas in the manner in which the complainant receiver was engaged therein within the state of Kansas constituted interstate commerce and the engagement therein by the complainant receiver in the transactions involved in said case, and that the acts and conduct of said receiver involved in the transportation and sale of said natural gas to his patrons in the towns and cities of the state of Kansas and in other places therein constituted interstate commerce, and that the said business of transporting and selling natural gas to his patrons in the state of Kansas was not subject to the control of the Public Utilities Commission for the state of Kansas within and under the local laws of the state of Kansas.

#### VII.

That the United States district court for the district of Kansas erred in determining that the rates prescribed by the Public Utilities Commission for the state of Kansas for the distribution of natural gas to the patrons of the complainant receiver were arbitrary, unreasonable and confiscatory and in violation of the constitution of the United States, as aforesaid, in that, in addition to other errors herein complained of, the court erroneously held that the cost and price of gas to the complainant receiver, delivered by vendors of the same to him at his pipe lines in Oklahoma and Kansas, was six cents per 1,000 cubic feet of gas, so delivered, whereas such findings were not supported by the evidence.

#### VIII.

The said United States district court for the district of Kansas, in the case below, erred in holding in the final trial of said cause, for the purpose of amortizing the value of the property

of the complainant receiver and hence determining the validity of the rates prescribed by the Public Utilities Commission for the state of Kansas for the transportation, delivery and distribution of gas by the complainant receiver, as aforesaid, that the probable life of the property of the complainant receiver then in his control was of the probable duration of five years, when in truth and in fact the value of said property and the just and legal amortization thereof for the purpose of fixing a return thereon should have been determined by the actual physical value and condition of said property, and the findings of the court were not sustained by the evidence adduced in said cause and the record therein.

#### IX.

The United States district court for the district of Kansas erred in refusing to dismiss the complaint of the complainants in the case below in so far as the question of interstate commerce was involved and material and in refusing to consider said question and to determine said cause against complainants on the questions involved as to interstate commerce, for the reason that said questions of interstate commerce had been fully determined in cases previously brought and prosecuted between the same parties, who were parties to the case below, and because said question of interstate commerce and all the facts and circumstances relating thereto, as it appeared from the evidence adduced in said cause and the record therein, had become *res adjudicata*.

#### X.

That the United States district court for the district of Kansas erred in holding the rates prescribed by the Public Utilities Commission for the state of Kansas for the sale and distribution of gas by the complainant receiver within the state of Kansas to be arbitrary, unreasonable, confiscatory and in violation of the constitution of the United States, as aforesaid, in addition to the other errors complained of herein, in that said court held and considered the cost of making extensions to the property owned by and in control of the complainant receiver for the purpose of improving the supply of gas to be chargeable as operating expenses in the maintenance of said property, whereas such expenses and cost of extensions of the pipe lines of the complainant receiver and other permanent im-

provements were properly and legally chargeable to the capital account of the said property and should not have been charged in the estimates made by the said court as against said property and its patrons as operating expenses.

# XI.

That the United States district court for the district of Kansas erred in the case below in that it appeared from the evidence adduced by the parties in said case and the record therein that the rates in controversy in said suit and complained of by the complainant receiver were voluntarily put into effect by said receiver, and that the receiver did not exact from his patrons within the state of Kansas as high a rate for the transportation and distribution of natural gas to them as he was entitled to charge for such services, and that for said reason the said complainant receiver should not have been permitted by the court in the case below to have contended that said rates were arbitrary, unreasonable, or confiscatory, or in violation of the constitution of the United States, and that the evidence in said case showed that said rates were reasonable, legal, and were not confiscatory or unconstitutional, but were fair and just to said complainant receiver and his patrons throughout the state of Kansas.

F. S. JACKSON,  
H. O. CASTER,

*Attorneys for the Appellants.*

Kansas State Capitol, Topeka, Kan. Filed in the district court July 5, 1917.—MORTON ALBAUGH, *Clerk*.

No. 856.

## IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.—FIRST DIVISION.

In Equity. No. 136-N.

JOHN M. LANDON, as Receiver of the Kansas Natural Gas Company,  
*Plaintiff,*

*vs.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS *et al.*, *Defendants.*

**Assignment of Errors on behalf of the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, Members of the Public Utilities Commission for the State of Kansas, and H. O. Caster, At-**

**torney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney-general of the State of Kansas.**

And now come Joseph L. Bristow, John M. Kinkel and C. F. Foley, commissioners of the Public Utilities Commission for the state of Kansas, and H. O. Caster, attorney for said Commission, and S. M. Brewster, attorney-general of the state of Kansas, appellants, and make and file this their assignment of errors in their appeal herein.

### I.

The district court of the United States for the district of Kansas erred in holding that the sale and distribution of gas in the manner in which the complainant receiver was engaged therein within the states of Kansas and Missouri constituted interstate commerce and the engagement therein by the complainant receiver in the transactions involved in said case, and that the acts and conduct of said receiver involved in the transportation and sale of said natural gas to his patrons in the towns and cities of the states of Kansas and Missouri, and in other places therein, constituted interstate business, and that the said business of transporting and selling natural gas to his patrons in the states of Kansas and Missouri was not subject to the control of the Public Utilities Commission of the state of Kansas or the Public Service Commission of the state of Missouri within their respective states and under the local laws of the said states.

### II.

That the said United States district court for the district of Kansas erred in the court below in holding that the contracts entered into between the various distributing companies located in Kansas were not binding upon the complainant receiver.

### III.

The United States district court for the district of Kansas erred in the court below in enjoining the Public Utilities Commission for the state of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, as the Public Utilities Commission for the state of Kansas, and H. O. Caster as attorney for the Pub-

lic Utilities Commission for the state of Kansas, and S. M. Brewster as attorney-general of the state of Kansas, and the defendant cities in Kansas, from enforcing the aforesaid supply contracts or rates fixed or referred to therein against said complainant receiver and said distributing companies, and from interfering with the plaintiff or any of said defendant distributing companies in establishing and maintaining such rates as the said court had approved or might thereafter approve for consumers of natural gas in the state of Kansas.

IV.

The United States district court for the district of Kansas erred in the court below in enjoining the mayors and common council and governing officials, city attorneys, city counselors, or representatives of the defendant cities, and their successors in office, from commencing, instituting, or prosecuting in any other court or tribunal any suit or proceeding to litigate any matters determined by the United States district court for the district of Kansas without leave of said court first having been obtained.

F. S. JACKSON,

H. O. CASTER,

*Attorneys for Appellant.*

Filed in the district court this 8th day of November, 1917.—  
MORTON ALBAUGH, *Clerk.*

## ARGUMENT.

### INTERSTATE COMMERCE.

#### (a) The Transportation, Sale and Distribution of Gas by the Receiver is Not Interstate Commerce.

On this general subject of the nature of plaintiff's business, the facts as heretofore set forth were adopted from a former decision of the Kansas supreme court in the Flannelly case, 96 Kan. 372, *infra*—in reality this case—and we can use no stronger argument than to repeat the reasons given by that court for its conclusions.

#### STATE V. FLANNELLY, 96 KAN. 372.

"It is contended that the receivers are engaged in interstate commerce, and for that reason are beyond the control of the Public Utilities Commission. That the transportation of natural gas from one state to another is interstate commerce must be conceded. (*West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. Rep. 564, 35 L. R. A., n. s., 1193; *Haskell v. Cocham*, 109 C. C. A. 235, 187 Fed. 403.) Numerous other cases might be cited. However, that is not the question we have to determine. Our question is, When does the natural gas that is sold by the receivers in the several cities in this state cease to be an article of interstate commerce? In 7 Encycl. of U. S. Sup. Ct. Rep. 298, we find a clear and condensed statement of the rules to be deduced from the decisions of the United States supreme court, as follows:

"The general rule is that as long as an article imported remains in the hands of the importer in the original and unbroken package in which it was imported, it is protected by the commerce clause of the constitution from the interference of state laws, and that it is only when the original package has been sold by the importer or has been broken up by him or has otherwise become mixed with the common mass of property in the state, that it becomes subject to state legislation."



"The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. The gas, when sold, had become mixed with the common mass of property in this state by being so commingled with gas produced here as to completely lose its identity. It is a matter of common knowledge that service pipes from the pipe lines of the distributing companies to private residences and other buildings belong to the owners of the property served, and installations are made at their expense. If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say, 'This came from another state, and has not yet become commingled with the mass of property in this state so as to make it a part of that property.'

"All property now owned in this state, and not produced here, was at one time a part of interstate commerce. The goods on the merchant's shelf, the wagons and plows in the farmer's field, the horses and cattle that he has imported from another state, were all a part of interstate commerce at one time, but have ceased to be such, although they have not been sold and are still owned by the persons who imported them. These ceased to be under the protection of the interstate commerce clause of the constitution when they became a part of the property of this state. The farmer who imports a wagon, a horse, a carload of corn, or a piano, may or may not intend to sell the article imported. Does the interstate commerce character of this property attach until it is sold? It does not. It can not. A carload or a trainload of wheat may be shipped from this state to Kansas City, Mo., and be there placed in an

elevator and mixed with another carload or trainload of wheat from some county in Missouri, and may be held for delivery to some one who has ordered it, or be held for sale to any one who will buy it. Will that wheat from Kansas, after being commingled with the wheat from Missouri, be under the protection of the interstate commerce clause of the federal constitution and outside the control of Missouri, under laws legally enacted by its legislature? If this question is answered in the affirmative, it extends interstate commerce much farther than any decision of any court yet rendered of which we have any knowledge or information. Before selling natural gas it became necessary to obtain franchises from the several cities under the laws of this state. These laws provided that in certain classes of cities the franchises might name the price at which gas should be sold. If the business done by the receivers in this state is interstate commerce, and the state has no power to regulate the price at which gas may be sold, the laws providing for fixing rates in franchises were invalid, so far as gas coming from another state is concerned."

The trial court in this case answers this argument by the statement of a number of propositions which, as stated by the court, have a bearing upon the instant case, and authorities cited in support of each of them. They are as follows:

(1) Interstate commerce begins when the goods are delivered to the carrier for transit from a point in one state to a point in another state, or are actually started on their ultimate passage.

(2) Interstate commerce ends when the shipment reaches its intended destination, and except where Congress has expressly otherwise provided, the protection afforded to an interstate shipment includes the right to sell by the person introducing the goods; at least, up to the time when they have become commingled with the general property of the state; and where the goods are introduced in the original packages; commingling does not take place until the original package is broken.

(3) The intent and purpose of the party making the shipment have an important if not controlling bearing upon the question of where the interstate journey ends.

(4) A change of carriers or plurality of carriers does not affect the status of the interstate shipment.

(5) Change of ownership of the property during transit does not necessarily affect the status of the shipment.

(6) Employment of an agent at the point of destination to effect delivery to the ultimate consignee does not destroy the character of the shipment.

(7) The time and place at which the title to the goods passes as between the seller and buyer is not controlling upon the character of the shipment.

(8) The parties, shipper, carrier, and consignee may be three separate parties, or a less number.

(9) Absence of a specific consignee at the time of shipment does not alter the character of the shipment.

(10) The exact destination need not be fixed at the time of the shipment provided the intent and purpose is to continue the journey beyond the limits of the state in which the journey begins.

There is no question about the correctness of any of these propositions of law, and the only difficulty arises in their application to the case, and so far as we are able to see not many of them are of vital importance in the matter.

We note in the statement numbered 3 that the intent and purpose of making shipment is said to be important, if not controlling, upon the question of where the interstate journey ends. We think the intent and purpose of the party as to whether the shipment of goods from one state shall be commingled with the general property of the state into which the shipment is made as a part of the movement of the goods is absolutely controlling as to whether the shipment is state or interstate.

This proposition controls as to the statements made in numbers (7), (9) and (10), because if the shipper intends during the movement of the goods which he ships to sell the goods after they have become commingled with the general property of the state into which he has shipped them, the time and place of the sale is material, as it would necessarily take place after the commingling of the goods and within the state to which the shipment was made; and, 9, the absence of a specific consignee at the time of shipment is material because in most cases it would indicate an intention on the part of the shipper, unless his goods were sold in original packages, to commingle his property with the general mass of property in the receiv-

ing state and hold the same for sale when a buyer could be found.

So, in the case of 10, where the destination is fixed at the time of the shipment, or later, the important point is the intent and purpose of the shipper. In a case of a change of carriers or plurality of carriers, 4, or the employment of an agent at the point of destination and the effect of these matters upon changing the nature of the shipment, depends entirely upon what the additional carrier or the agent is to do with the shipment, as will be seen from the cases hereinafter noted.

In other words, it seems that when it is once definitely shown that the shipper intended at the time of starting the shipment that his goods upon arrival in the receiving state should immediately be commingled with the general property of the state and there subject to local laws, the shipment is immediately intrastate, at least upon its arrival at the point where the commingling takes place, and all other elements of the transaction become immaterial. The trial court, however, in applying the aforesaid principles attempted the following analysis of the transaction involved in the instant case (rec. 593) and there says:

(a) That the shipment is started on its journey from one state to another, (b) with the purpose that it shall be delivered to a customer; (c) that it moves continuously from a point of shipment in one state to the consumer in another state; (d) that it is moved part of the way in the pipe lines of the receiver, and part of the way in the pipe lines of the distributing company; whether as agent of the receiver or as connecting carrier is immaterial. (e) The destination of the shipment is intended at the time of the shipment to be beyond the state, although the name of the particular consumer for any specific portion of the gas shipped is not known. (f) There is no stoppage in transportation. (g) The title to the gas remains in the receiver until delivery to the ultimate consumer.

And concludes with the statement, in substance and effect: "There are continuing orders by the consumer to the receiver through the distributing company to supply them with gas from the Oklahoma fields." Such transactions have the character of interstate commerce at their inception and this character continues until final delivery."

The fundamental errors in this reasoning of the court may be pointed out as follows: In the first place (*a*), (*b*) and (*c*) are all one and the same thing, but the shipment is not intended for delivery to the consumer, but it is intended that the residue of the gas, after being transported through the lines of the transportation company, commingled with gas produced in the receiving state, already in the pipe lines of the transporting company and the distributing company, and the part used for the purposes of transportation in condensers, and perhaps other apparatus, the remainder, then, to repeat, is held for the purpose of sale to whomsoever shall pay for it, in such quantities and at such times as the party shall apply to the local agent who holds the same for sale.

So, too, statements (*f*) and (*d*) apply to the same thing, but are inconsistent with each other when the nature of the business is fully understood, for there *is stoppage in transportation*, at least when the gas brought through the trunk lines reaches the pipe lines of the distributing company. There, many times, a mixture with gas locally produced takes place; but, more important than this, it is necessary that the gas be held at a certain pressure ready for delivery upon the local demands of the consumers. The testimony shows that the gas comes in at one pressure over the lines of the transporting company, but it then must be held, its pressure changed, sometimes more than once, as it is distributed out to the smaller lines for delivery through the meters of the consumers. These are elements, as is stated by the Kansas supreme court, which would render the delivery of this gas a transaction local in its nature. There is no elevator, warehouse or holder, in most cases, in which gas can be stored and held for its final step of delivery, but it is held in the pipe lines of either the distributing or transporting company for delivery in just the same manner as delivery of any other commodity from a warehouse would take place, and the commingling of the foreign gas with the local gas has already taken place within these pipe lines.

It is apparent that the discussion of this phase of the case, that is, as to the manner in which the gas is handled, is in reality an attempt to apply the doctrines usually referred to as the original package theory, as distinguished from the fact of commingling the property imported with the general property of the state into which the import is made. The reason for

these rules has been well considered and many times expressed by this court, but it is apparent that the reason for the original package doctrine is that where goods are imported in their original package and the sale takes place at the destination of that package as an incident of the sale (*Leisy v. Hardin*, 135 U. S. 100) such circumstances absolutely preclude the intention of the importer to mingle his goods with the common mass of property in the import state.

Gas is not transported in original packages. There is nothing about its delivery that can resemble in the slightest degree an order except that the consumer has established a meter and a permanent connection with the pipe line through the local agent of the receiver or transporting company, but there is no order because he takes the gas or refuses it as he pleases and in such quantities as he pleases. Indeed, it is proposed that he should pay a different price according as he shall use much or little of the gas consumed.

We understand, of course, that in the case of pipe lines like those used for the transportation of oil that perhaps upon an order for a stated amount delivered at the end of the pipe line, and in a case where the pipe line was used for interstate transportation, that the company operating the same as an interstate carrier might maintain the identity of the oil, and that such pipe lines have been placed within the control of the Interstate Commerce Commission. The fact that Congress declined to take control of pipe lines transmitting gas must have been based upon some reason, sounding in the very nature of the transaction, which made such business different from that of the transportation of oil in pipe lines. The case is different, too, from that of a railroad and other carriers engaged in interstate commerce, for there is no commingling of property in that case. Each interstate shipment is separate and distinct from each intrastate shipment. It is only the operating agency itself which is engaged in both services.

What is the reason underlying the principle that goods imported into a state and commingled with the general property of that state lose their interstate character? There can be but one answer to this, and that is the difficulty of identifying what is state and what is interstate, and the further fact that the police power of the state is one of its sovereign powers and cannot be destroyed by the individual who sets up a claim that

he is engaging in interstate commerce and therefore not subject to the control of the state's local laws.

What is the original package in which gas is imported? The only answer which has been given to this question has been the suggestion of the supreme court of Kansas that it was the pipe line itself. Then, surely, no sale is made in the original package, for the sale is made by metering the gas into the pipe line of the consumer. He does not buy the pipe line of the Gas Company, nor even all of the gas in it, and "return the package"; but he does break the package and take a part, what he desires at the moment, from the contents of "the package."

The case under these circumstances becomes very much like the cigaret case (*Austin v. Tennessee*, 179 U. S. 343), in which the court said:

"Paper packages of cigarettes, each 3 inches in length and 1½ inches in width, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company, in a basket which it furnishes, in which it carries them and from which it empties them on the counter of a consignee in another state, do not constitute original packages of interstate commerce, but, if there is any original package in the shipment, it is the basket."

The court further said:

"The size of the package in which the importation is actually made does not govern; but the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country." *Austin v. Tennessee*, 179 U. S. 343, 359, 45 L. Ed. 224; *Cook v. Marshall County*, 196 U. S. 261, 271, 49 L. Ed. 471.

And again:

"It is sufficient for the present to say, generally that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as



an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.' This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the chief justice that, by a skillful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states."

We think it fairly appears that there is no package at all in the transportation of gas, as a pipe line is only the means of transportation. It is the railroad track of the railroad, the bottom of the ship in water transportation, the automobile or truck in the transportation of goods over public highways. Wherever the pipe lines are tapped and the gas contained therein offered for sale to whosoever will buy, then a veritable retail store exists for the commodity contained in the pipe lines. The case is similar to that in which goods are imported by the train load and then offered for sale in separate carloads without unloading or changing the cars. Or again, cases in which goods are shipped in cars and the cars held upon the track while sales are made indiscriminately from the cars.

In these cases the railroad track or the railroad car respectively becomes a warehouse within the meaning of the law, and the seller of such goods has expressed his intention by his method of business of engaging in the local business in the state where the sales are made. A number of cases carrying out this theory follow, including the interpretation placed upon such transactions by the Interstate Commerce Commission in the administration of law applicable to interstate carriers.



We call the attention of the court, first, to cases passed upon by the state courts, and among them one by the supreme court of Iowa, *State v. C. C. Taft*, 167 N. W. 467, where it was held:

"Where cigarettes in the original packages come to rest in the hands of a dealer whose custom has been and whose intent is to break the packages and sell them, they are no longer interstate commerce and are subject to seizure under Code, section 5006, etc."

The supreme court of Oregon said, in an *ex parte* case:

"Relator under an agency contract for the sale of vehicles for an Iowa corporation, passed through the country from house to house with a catalogue and took an order for the sale of a vehicle to H., which order relator sent to the corporation's superintendent within the state, who, after satisfying himself as to the buyer's responsibility, delivered the vehicle from a stock kept in storage, shipped, knocked down, in carloads. *Held*, that interstate commerce involved in the shipment of the vehicles from Iowa to Oregon ended when the vehicles were placed in storage before sale, when they became part of the general mass of property in the state, and hence relator was not relieved from liability for violating the statute regulating peddlers on the theory that he was engaged in interstate commerce." (135 Pac. 881.)

The court in the opinion said:

"It was one of a number of vehicles shipped from Iowa in car lot, knocked down, and was put together in the warehouse at Roseburg, Ore. This sale or the delivery of the goods did not in any way depend upon interstate commerce. When the goods were unpacked at Roseburg they became a part of the general mass of property in the state and were subject to the state laws as other property within the state. They lost their character as interstate shipments when delivered at their destination and offered for sale."

In *Nernse Lamp Co. v. Conrad*, 131 N. W. 120, the syllabus reads as follows:

"Plaintiff, a foreign corporation, engaged in manufacturing lamps had a sales office in the state, and sold defendant a number of lamps; the contract providing for renewal of the parts and the maintenance of an agency by plaintiff within the state,

to repair and replace the goods sold, for an indefinite period. *Held*, that the business conducted by plaintiff, as shown by the contract, in selling the lamps and in furnishing the repair parts was not interstate commerce.

"In an action for the price of certain lamps, to be used as a part of an electric lighting system, evidence *held* to show that the contract between plaintiff and defendant contemplated plaintiff's maintenance within the state of an agency to examine, repair, and replace the goods sold, for an indefinite period."

*State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 802, the supreme court of Iowa, in the first paragraph of the syllabus, said:

"A wholesale coal dealer in Iowa procured shipment of coal from Illinois to himself as consignee. The coal was there held until sales were made, when he paid the freight to the initial carrier, and had the cars placed on the interchange track, and tendered a written billing of the coal to carriers for shipment to other points. *Held*, that there was a delivery of the coal to the wholesaler at his place of business, and the transportation of the coal under another billing was intrastate transportation governed by the laws of Iowa."

*Locerin & Brown Co. v. Tansil*, 102 S. W. 77:

"A salesman representing a foreign mercantile corporation solicited orders for merchandise, to be paid for on delivery if found as represented. When the canvass of the community was completed, the salesman classified the merchandise called for in the several individual orders obtained, ascertained the quantity of each article, and sent to his employer one general order covering the aggregate number or quantity of articles of each class. The goods thus ordered were packed in large boxes and barrels and shipped by a common carrier to a point designated by the salesman, to whom the bill of lading was sent. Upon receipt of the goods the salesman opened the boxes and arranged the goods for delivery to the purchasers on payment of the purchase price. The money received on delivery of the goods was remitted to the employer. *Held*, that the corporation was not engaged in interstate commerce, but in the business of a retail merchant in the community in which the transactions were made, rendering it liable for the privilege tax imposed upon local merchants."

In the opinion it said:

"When the boxes and barrels containing the aggregate order arrive at the place of delivery, the salesman receives and opens them at some convenient place, and separates and arranges the goods for delivery, by placing all articles of a kind together.

"When a customer appears, the written order given by him is examined, and the articles therein called for are taken out of the several piles of merchandise and delivered to him. When all the goods are delivered, the money received by the salesman is remitted to his employer at the home office in Chicago. No goods are to be ordered by the salesman unless he has procured individual orders for them, and all goods ordered and shipped, but not accepted, are returned or given away.

"This was the manner in which complainant did business in Sharon and Weakley counties. The orders obtained in Sharon were for family groceries, and aggregated about \$300.

"We are of the opinion that this was commerce within the state, and not interstate commerce. The boxes and barrels in which this merchandise was packed by complainant and delivered to the carrier in Chicago, to be transported to Sharon, Tenn., there to be delivered to its salesman, were original packages within the meaning of the commerce clause of the constitution of the United States, and when complainant's salesman broke them, and classified and assorted the contents, they became commingled with and a part of the common mass of the property of the state, and were subject to its police regulations and revenue laws."

The Iowa case quoted above, *State v. Chicago, M. & St. P. Ry. Co.*, was appealed to and affirmed by the supreme court of the United States in 233 U. S. 334, 58 L. Ed. 988. The opinion was by Justice Hughes, and is absolutely decisive of every question presented in this case so far as interstate commerce is concerned. In that case, as stated in the syllabus quoted from the state case above, the consignee, a wholesale dealer in Iowa, procured a shipment of coal from another state to himself, and the coal was there held until resold and shipment made to intrastate points. The question arose over an order issued by the Iowa State Railway Commission requiring the local railroads to accept the coal so shipped in the cars in which the shipment was made and to deliver it therein at

the destination of the intrastate shipment and to make application thereto of the intrastate rates. The syllabus of the supreme court is in part as follows:

"The reshipment by the consignee to other points within the state of coal consigned to it on interstate shipments to a distributing point within the state, although such reshipments are in the cars in which the coal was received, does not establish such continuity of transportation as to place such reshipments outside the pale of state regulation, where the consignee paid the freight to the point of reshipment to the initial carrier, which placed the cars on an interchange track, where they were held by the consignee until sales were made, when bills of lading were tendered to another railway company for the further transportation.

"An order of a state railroad commission requiring a railway company to accept without unloading and reloading into its own cars reshipments of coal in carload lots when tendered in the cars of other railway companies by which the coal had been brought into the state does not interfere with interstate commerce where there is such a termination of the interstate transportation at the point of reshipment that the further transportation is a purely intrastate service."

It was also determined that such an order did not deny due process of law, liberty of contract, or equal protection of the laws to such railroad companies affected by such orders. These questions are argued out in full in the briefs in said cause and the questions comprehensively considered and finally determined by the court. The facts of this particular case were also carefully considered by the Interstate Commerce Commission, and its determination may be of interest to the court upon a question of so much importance and one upon which this Commission is especially qualified and authorized to speak. We therefore adopt as a part of our brief the discussion of this question contained in a letter dated February 18, 1915, by Commissioner Clark of the I. C. C. to Mr. O. F. Bell, secretary of the National Industrial Traffic League, of Chicago, Ill., referred by Commissioner Clements to the Kansas Commission, as expressing the views of the Interstate Commerce Commission upon this question.

"Your letter of the 8th has been considered by the Commission, and I am directed to say:

"We think that the supreme court has decided the question which you present in the following cases:

"In *Gulf, Colorado & Santa Fe Railroad Co. v. Texas*, 204 U. S. 403, the shipment involved actually originated in Dakota. It was treated in transit at Kansas City, and finally reached Texarkana as an interstate shipment. It was not removed from the car, but was later forwarded to Goldthwaite, Texas. The carrier demanded for that movement charges as for an interstate shipment which were higher than the local state charges. The supreme court held that the movement from Texarkana to Goldthwaite was a state movement, and made it quite clear that this holding was based upon the fact that when the shipment was forwarded to Texarkana as an interstate shipment its final destination was not known; it might be consumed at Texarkana; it might be forwarded intrastate to another Texas point; or it might be forwarded to some other point as an interstate shipment. It did not move to Texarkana with any definite intention or purpose of any other final destination. The interstate transportation therefore, ended at Texarkana.

"In *Texas & New Orleans Railroad Co. v. Sabine Tram Company*, 227 U. S. 111, the shipments were lumber which had been sold for export to a foreign country, which was hauled to Sabine for the purpose of exportation; was handled in all respects as for export and without any purpose or intent to use it or reship it other than as per the original plan of exporting to a foreign destination. The court held that the tariff rates for foreign shipments were lawfully applicable, although they were higher than the rates between the same points for local state shipments, and clearly differentiated that case from the *Gulf, Colorado & Santa Fe v. Texas* case, above referred to.

"In *Chicago, Milwaukee & St. Paul Railway v. Iowa*, 233 U. S. 334, the shipments involved were coal shipped to Davenport interstate and later forwarded, without being unloaded, intrastate to other points in Iowa. When the shipments were made to Davenport it was not known whether they would or would not go farther, or whether they would go farther as state or interstate shipments. The court held that where the

further shipment was to another Iowa point and within the state of Iowa, it was an intrastate movement subject to the jurisdiction of the Iowa Commission, this holding being clearly in line with the previous decision in the *Gulf, Colorado & Santa Fe v. Texas* case.

"From these decisions it seems to be well established that where shipments are made interstate to a point and without knowledge or definite purpose as to any other final destination, the further shipment wholly within one state is intrastate; but where the original purpose is to forward the shipment interstate to a previously determined and known destination, it is a through shipment from point of origin to such further destination and must be so recognized and treated, and the lawfully established interstate or foreign rates are applicable to the movement, despite the fact that there may be lower intrastate rates between certain intermediate points or from some intermediate point to the final destination.

"If a shipment is forwarded interstate to an intended destination and for some reason it later becomes necessary to forward to some other point upon a new contract of shipment and a new bill of lading, the transactions would apparently be separate and distinct from each other, provided they were conceived and carried out in perfect good faith and not for the purpose of defeating the lawfully established and otherwise applicable through interstate rate.

"We do not think that we can make this situation any clearer than it seems to be made in the supreme court decisions above referred to."

Comment upon other cases of the supreme court of the United States in the foregoing letter makes further mention by us unnecessary. We call attention of the court, however, to a few additional cases, which are of interest on this question:

*Brown v. Houston*, 114 U. S. 622, was a case very similar to the Iowa case from which we have just quoted. The fifth paragraph of the headnotes of that case is as follows:

"Coal, sent by the owners in Pennsylvania to their agents in New Orleans, to be there sold for their account, upon its arrival, becomes a part of the general mass of property of Louisiana,

and is subject to taxation in common with all other property, and in precisely the same manner. The fact that some of it is subsequently sold for exportation does not alter the case."

In the opinion the court said:

"This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiffs' coal from the state of Pennsylvania into the state of Louisiana, and the free disposal of the same in commerce in the latter state; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the state until Congress shall see fit to interfere and make express regulations on the subject.

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

Another case directly in point is the case of *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451. The question here presented is whether the Armour Packing Company was transacting local or interstate business and whether such local business was in conflict with the local laws of North Carolina.



The statement of fact by the state court, which was affirmed by the supreme court of the United States, is as follows:

"If the business of the defendant was solely that of shipping food products into this state, consigned directly to purchasers, on orders previously obtained, it is clear that this would be interstate commerce, and a tax laid by the state upon such business would be illegal. But the defendant does a large business within the state—the selling of products already stored here on orders received after these products are thus stored. The tax is laid upon every meat-packing house 'doing business in this state.' The evident meaning of the legislature is to tax the agency 'doing business' within this state, and not to lay any tax upon the interstate commerce of shipping products into the state, to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped."

We call attention also to the case of *Hopkins v. The United States*, 171 U. S. 577, a case of special interest, in view of the fact that the respondents seem to rely upon the Swift case, in which it was held that the Swift company had violated the antitrust laws of the United States. The case is of further interest because of the fact that the business was transacted upon the Kansas City stockyards by means of agents who received the property for the consignee and sold it for his account. The headnotes in the case which are deemed to be in point are as follows:

"The business of buying and selling live stock at stockyards in a city by members of a stock exchange as commission merchants is not interstate commerce, although most of the purchases and sales are of live stock sent from other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market.

"A commission agent who sells cattle at their place of destination, which are sent from another state to be sold, is not engaged in interstate commerce; nor is his agreement with others in the same business, as to the commissions to be



charged for such sales, void as a contract in restraint of that commerce."

As the Swift case (196 U. S. 375) relied upon by plaintiff involves transactions upon the Kansas City stockyards and by the meat packers, we call attention of the court to the fact that the controversy in that case was largely one of pleading, in which the court was called upon to sustain or set aside an indictment drawn on the antitrust law of 1890, and it was there held that although some of the sales upon the stockyards might pass title to the buyers of the stock in question, and therefore be in their nature intrastate, that such transactions might still be considered a part of interstate commerce if the purchases were made with intent that the fresh meats manufactured from such sales were to become a part of interstate commerce. But the real decisive point of the case was that the indictment fairly showed that some at least of such meat was sold in other states in original packages.

It is clear that the characterizing principle of the foregoing cases is that the shipper designed to have his shipment become a part of the general property of the state to which they were shipped and subject to all its laws, either by directly commingling them with such state property and losing thereby the identity of the goods in the shipment, or by holding them for sale at retail, or rather in detail, thus distributing them throughout the state with other common property subject to its jurisdiction.

It is immaterial in such a case whether the interstate character of the shipment is lost at the state line or later, in so far as the instant case is concerned, as distribution of the gas begins at or near the state line. It is the antithesis of sale in the original package or holding for sale by original package. There the exclusiveness of the interstate goods is protected by the package until its delivery to the person for whom it was shipped or the person to whom it was sold "as incident of the importation."

It is probably true, as stated by the trial court, that the employment of an agent to effect delivery does not affect the situation; it is rather what the agent does as reflecting the will of the shipper that counts in the determination of the nature of the shipment.

As illustrating this proposition, we call the attention of the court to the recent case of *Dalton Adding Machine Co. v. Commonwealth of Virginia, ex rel. State Corporation Commission*, decided April 15, 1918, 38 Sup. Ct. Rep. 361. In that case the court said:

"Plaintiff in error, an Ohio corporation, complains that the supreme court of appeals of Virginia improperly affirmed an order by the corporation commission assessing a fine against it for transacting business in the state without certificate of authority required by law. (118 Va. 563, 88 S. E. 167.) That court adopted and approved the commission's opinion, which, among other things, declared:

" 'We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding Machine Company is doing a substantial part of its business in this state in the following particulars:

" '(a) In bringing its machines into this state before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this state, after their transportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this state;

" '(b) In renting such machines and collecting rents therefor from its customers in this state at will;

" '(c) In buying and exchanging machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

" '(d) In employing a mechanic in this state and entering into contracts for repairing of machines owned by persons in this state from time to time and collecting the charges therefor:

" '(e) In keeping on hand in this state certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agent in Richmond to its customers.

" 'We think it perfectly apparent that in these particulars the business of the company in this state is

not "commerce among the states," the freedom of which is guaranteed by the United States constitution, but that such business, in every essential particular, is business which has been transacted by the company in this state in violation of the statutes referred to.'

"Beyond serious doubt the above specifications concerning the business carried on in Virginia are supported by the record. A material part of it was intrastate."

Referring to the opinion of the state supreme court, which, by the foregoing opinion is stamped with approval by the opinion of this court, we find the following in reference to the first paragraph of the opinion of the state court quoted above:

"The machine is left with the desired customer for trial for a reasonable time, and afterwards, if he concludes to buy, he signs an order for that identical machine, which had been previously put in his possession, which order is sent to the Dalton Adding Machine Company at its home office, now in Ohio, and the sale is then said to be consummated with the approval of the company.

"That this method of transacting business by the Dalton Adding Machine Company is a mere device for the purpose of avoiding the state statutes is apparent when the contention is made that, even in case of a cash transaction, when a machine previously in the possession of the purchaser is sold by a local agent to that purchaser for cash, strictly in accordance with the previous instructions given to the local agent, such a transaction needs confirmation by the company at its home office. The price is fixed, the property delivered, the terms complied with, and nothing is left of such a transaction except for the local agent to send the check or the currency to the selling company. Inasmuch as the purchaser has complied with every substantial term of the contract, it is not believed that the selling company could refuse to accept the purchase price, notwithstanding the device referred to. It can only be resorted to in case of such cash transaction for the purpose of attempting to convert 'into a form resembling interstate commerce that which in its intrinsic substance is local business subject to state control.' A similar effort has been

vainly essayed and condemned by the Supreme Court of the United States. *Browning v. City of Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828.

"The sales of such machines thus in the state, mingled with the other property in the state and subject to local taxation, cannot be distinguished from the sales of any other property thus located in the state. If the mere intention of the seller, a citizen of another state, to sell such machines before having shipped them into this state and his necessary confirmation of such sales stamps such transactions interstate commerce, then the shield which the constitution intended for commerce between the states will, by a strained and unnatural construction, become a sword for the destruction of commerce in the states. Commercial transactions in this state involving the bargain and sale of specific commodities sold in competition with local dealers may escape all state exactions by the mere device of having the nonresident owner ship them into this state and say that (even when they are sold for cash) all sales are subject to his approval outside of the state. It seems to us that the mere statement of the results which would follow if this admittedly new doctrine is established would be so revolutionary as to condemn it as unsound."

See, also, the case of *Marconi Wireless Telegraph Company v. Commonwealth*, 218 Mass. 558.

The above authorities not only fully sustain the proposition in support of which they were cited, but in addition thereto it seems beyond controversy that the assumption of the trial court that the manner in which local gas consumers purchase gas amounts to standing orders would be wholly immaterial. The character of the transaction cannot be changed by simply calling it an order. There is no certain quantity of gas contracted for, and certainly no particular or specified quantity set aside in the course of shipment for the purchaser. On both the proposition of the acts of the agent in completing delivery and the necessary nature of orders to protect the interstate character of the shipment we believe the opinion of this court in *Browning v. Waycross*, 233 U. S. 16, is controlling. The syllabus of that case is as follows:

"The business of erecting lightning rods within the corporate limits as the agent of a nonresident manufacturer on

whose behalf such agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license tax without violating the commerce clause of the Federal constitution, although the contracts under which the rods were shipped bound the seller at his own expense to attach them to the houses of the persons who ordered them."

Commenting on the cases of *Caldwell v. North Carolina*, 187 U. S. 622, *Rearick v. Pa.*, 203 U. S. 507, and *Dozier v. Alabama*, 218 U. S. 124, the court, speaking by Mr. Chief Justice White, said:

"It is evident that these cases when rightly considered instead of sustaining, serve to refute, the claim of protection under the interstate commerce clause which is here relied upon, since the cases were concerned only with merchandise which had moved in interstate commerce, and where the transactions which it was asserted amounted to the doing of local business consisted only of acts concerning interstate commerce goods, disassociated from any attempt to connect them with or make them a part in the state of property which had not and could not have been the subject of interstate commerce. Thus, in *Caldwell v. North Carolina*, the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental, for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the *Rearick* case. Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight jacket so as to destroy the possibilities of its being adapted to meet mere changes in the form by which business of an inherently interstate commerce character could be carried on.

"We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the state, and not the subject of interstate commerce, for the fol-

lowing reasons: (a) *Because the affixing of lightning rods to houses was the carrying on of a business of strictly local character, peculiarly within the exclusive control of state authority.* (b) *Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated.* It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, *but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.* It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

See, also, the case of *American Steel & Wire Co. v. Speed*, 192 U. S. 508, where the court, again speaking by Mr. Chief Justice White, held:

"With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the state to levy the merchants' tax based on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: First, the asserted want of power of the state of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, in the original packages; and, second, because of the

alleged discrimination asserted to result from the provision of the state constitution exempting goods manufactured from the produce of the state."

Construing *General Oil Co. v. Crain*, 209 U. S. 211, and *The Western Oil Refinery Co. v. Lipscomb*, 244 U. S. 345, as in accord with each other, we believe that both cases fully sustain the views expressed above to the effect that there is a holding of the gas for distribution within the state of Kansas to anyone who will come and buy, and in such quantities as they may wish, which, under these decisions, constitutes an intermingling of the property with the property of the state. It will be noted that in the *Lipscomb* case there were definite and certain orders taken by a traveling salesman before the shipment, which called for a definite amount of oil to be delivered to the person who had ordered, while in the *Crain* case the oil was held at a distributing point maintained by the shipper and from this place it was distributed in such quantities as the purchaser might desire. In the latter case it was held that when oil reached this point of distribution its interstate character ceased and it became a part of the general property of the state. In this case the court, speaking by Mr. Justice McKenna, said:

"Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State, Detnold, Prosecutor, v. Engle*, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further



reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365.

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 356, 43 L. Ed. 195, 18 Sup. Ct. Rep. 862. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce."

See *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403.

Concluding this division of our brief, let us sum up the analysis given by the trial court in the light of the foregoing decisions and in view of what the testimony in the case fairly shows and we have that, as to the trial court's (a) and (b), all shipments intended for sale, start on their journey for the purpose of being delivered to a consumer at some point in the course of the journey.

(c) The gas does not move continuously from the point of shipment in one state to the consumer in another state. Much of it moves only within the state of Kansas. Most of the remaining part comes to a complete rest in the pipe lines of the receiver or those of the transporting company at each of the usual places of distribution of the gas; that is, every city which the distributing and transporting companies supply jointly becomes a regular depot or station from which the gas, completely at rest, is distributed under different pressures and processes, in different sized pipes, from that which is employed in the transportation lines.



(c) The destination of a part of the gas is intended at the time of the shipment to be beyond the state, that part produced in Oklahoma is intended to be actually commingled with domestic gas in Kansas, where about half of the entire bulk transported is consumed, and it is true that the name of the purchaser or the quantity that the purchaser will require in any case is not known and much of the gas will be consumed by the transporter himself in the process of transportation.

(f) There is a stoppage in transportation, as has been shown in (c). *The gas for each city is definitely set out by meters to each distributing plant and no part of this ever returned to the trunk lines.*

(g) The title does not remain in the name of the transporter, but is owned as much by the distributing company as the importer after the passage of the gas into the distributing company's lines at the ratio of one-third to two-thirds. While the distributing company does not account for any gas lost from its own lines to the transporting company, the fact that settlement is made on the basis of the actual sales results in the distributing company bearing its proportion of the loss throughout the transportation lines as well as in its own. The two elements of the transaction—transportation and distribution—seem to be elements of partnership rather than that of principal and agent in the sense that one of the parties is master of the other or enjoys a greater right to control.

Considered, then, wholly upon the point of whether there is a quantity of the commodity transported at rest and whether local distribution or commingling of that product with the general mass of the property of the state, we assert that it cannot be doubted that the distribution and sale of the gas to local consumers through the properties of the distributing companies is a separate and distinct function and process from that of the transportation through the pipe lines of the company, and, therefore, so far as the production, transportation, sale and distribution of gas is susceptible at all of being compared with other commodities, the court must say that the process is local and one wholly destitute of the principles of interstate commerce.

These matters all become plainer, if such is possible, by the discussion of our following propositions, which, for convenience, we have lettered (b) and (c), and have to do with the

acceptance and use of local franchises by the transporting and distributing companies in furnishing gas and contracts made by them in consideration of the use of the streets and alleys of the cities, contracts in some cases authorized by the state laws and in others not forbidden or disapproved by them. The fact that there is an actual commingling of gas imported with the domestic product in the pipe lines has been mentioned several times, and will also be discussed in connection with the remaining propositions.

**The gas business carried on under a local franchise (b) originally intended to apply wholly to local gas (c) estops the importer from claiming immunity from local control. The imported gas is still mingled with local gas, constituting a substantial proportion of the whole (d), and such commodities, even if not wholly deprived of their interstate character, are so connected with local or intrastate commerce as to be subject to state control, Congress having neglected and refused to legislate upon the subject. (e), (f).**

As stated in the paragraphs preceding this heading, the discussion of the following questions makes our contention and the application of the authorities cited in support of them clearer, and for these reasons and the further one that the whole subject is difficult of division into elements and parts, we discuss the remaining propositions of our statement together.

The Kansas Natural Gas Company, through its receiver, is virtually operating under the local franchises of the cities granted by the governing bodies of those cities in 1906, or prior thereto, by means of local ordinances. These ordinances in some cases recognize the Kansas Natural Gas Company as a joint worker with the distributing company. The statement made by the supreme court of Kansas (rec. 1113), adopted by the trial court and all the parties to the suit as correct and fair, assumes that the receiver is acting under local franchises. The consideration for these franchises moving from the city was the right of the gas company to occupy the streets and alleys of the cities with its mains or other pipe lines, and the consideration flowing from the gas company was the promise of service to the people of the cities. The franchises thus entered into constituted valid and subsisting contracts, as we shall see,

both as to rates and the other terms and considerations of the franchises. See as typical, supply contract between the Kansas City Pipe Line Company and Wyandotte County Gas Company (rec. 829, 830), ordinance No. 6051, Kansas City, Kansas, for the supply of gas by the Wyandotte County Gas Company (rec. 821). See, also, exhibit B to plaintiff's bill (rec. 47), setting forth a synopsis, including rates contained in the franchises under which the Kansas Natural operated.

The gas company was bound as to the rates to the extent that such rates could not be changed without the consent of the cities, even though the cities had no specific legislative authority to enter into such contracts. *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622, 88 Kan. 165; *Emporia Telephone Case*, 90 Kan. 118 and 88 Kan. 454. The gas company desired permission to transact its business in the Kansas cities. Indeed, the gas companies could not have transacted business, state or interstate, without mains on the city streets or alleys, and pipes leading therefrom, with which to make the meter connections.

As illustrating this point and the necessities of the Kansas Natural Gas Company, referred to herein often as the transporting company, the averments of the bill of John L. McKinney versus that company, a part of the record in this case (872, 873) will be found interesting. It should be mentioned here that this defendant, in addition to being the plaintiff in the equity suit to which this one is ancillary, has also specifically joined with the plaintiff, adopted the averments of his bill, and prays for the same relief. The parts of the bill referred to are as follows:

"*Eighth.* That at the time the Kansas Natural Gas Company proposed building its system of pipe lines mentioned in the sixth paragraph hereof, it was not considered advisable to itself distribute and market its gas in the said cities for the following, among other, reasons:

"(a) The expense thereof would have been enormous and burdensome, approaching, if not exceeding, twenty millions of dollars, and it was impossible for the company to finance the same, it being only able to finance the building of its main system of pipe lines.

"(b) The time necessary to build its distributing plants in the said several cities would have greatly delayed the com-

pletion of its system and the delivery of its gas to the waiting public, and also any return to the company on its investment.

"(c) It would have necessitated the tearing up of the street pavement in the said cities and the trenching of the streets and other public places with the consequent annoyance to the traveling public and the abutting owners.

"(d) It would have resulted in duplicate gas systems in each of the said towns, the natural gas lines paralleling those of the manufacturing gas plants, and, as it is a fact that a manufactured gas plant cannot compete with a natural gas plant, the business of the manufactured gas plants in the said cities would have been totally taken away from them and the investment in such plants wholly lost, excepting only the junking value thereof, and even as to that it could not be realized except by tearing up the streets and pavements of the cities, with the consequent annoyance to the traveling public and abutting owners.

"That it was for the public good as well as for the mutual benefit of both the Kansas Natural Gas Company and the several manufactured gas companies, that the plants of the latter in each of the said cities be utilized for the distribution and marketing of the natural gas therein, and to that end the Kansas Natural Gas Company contracted with each of the manufactured gas companies in the said several cities by which the Kansas Natural Gas Company should pipe its natural gas to the limits of the said cities and there deliver the same into the local manufactured gas system or plant, and that the local manufactured gas company should there take and receive the said gas and through and by means of its manufactured gas plant or system of pipes distribute, market and sell the same to consumers thereof in the said city, and that the proceeds from domestic sales should be divided in the percentage of sixty-six and two-thirds percent to the Kansas Natural Gas Company and thirty-three and one-third percent to the local distributing company, except in the two Kansas Citys in which the Kansas Natural Gas Company received only sixty percent for the first two years and sixty-two and one-half percent thereafter, the local distributing companies receiving forty percent for the first two years and thirty-seven and one-half percent thereafter"; etc.

When the contracts were made all parties contemplated that the gas should be produced in Kansas, transported in Kansas to the cities in Kansas and the consumers therein residing. It was natural, therefore, that the ordinances and contracts executed to the accomplishment of this purpose should contemplate local regulation both as to rates and service under the police power of the state. Congress having failed to legislate as to the control of the subject, would not the contract entered into between the local cities and a company intending to transact interstate business have become binding upon the corporation obtaining permission to transact a local business in each city? It goes without saying that the business is essentially local in its nature. It is such a business as has been described by the courts as peculiarly subject to local control.

Now we say that under these conditions, whether the business be state or interstate, the company which entered upon such arrangements and contracts should not be permitted to say that it will withdraw from all local control and contest the efficacy of the police power of the state to direct or control its activities. This proposition, we think, comes with peculiar force in view of the fact that the parties intended in the first place that all the business should be intra-Kansas, and from the further fact that to revoke this rule would be to destroy the police power of the state over the very matters where it was intended that that power should be supreme and where its exercise is necessary for the safety and protection of its people, and especially where, in all probability, the entire subject is under the rulings of this court subject to local control in any event. We can illustrate exactly what we mean by reference to the argument of the appellees in the trial of the case in the court below. There they said, referring to the decision of the supreme court of Kansas that the property of the receiver had become localized on passing through the pipe lines of the state for the purpose of local distribution, that, "Fortunately this view of the Kansas supreme court has been repudiated by the supreme court of the United States. See *Kirmeyer v. Kansas*, 236 U. S. 568."

We think here, as elsewhere, the appellees are greatly in error, but the case mentioned by them is valuable for illustration.

The *Kirmeyer* case, as is stated in plaintiff's brief, was a

straight case of interstate commerce where the testimony showed that orders were accepted in Missouri and the liquors transported across the state line and delivered on the orders to the consignees.

It was distinctly found by the courts that Kirmeyer had no Kansas license; that he did have a federal license to transact business in Missouri and paid merchants' and *ad valorem* taxes in Missouri. There was no pretense that he conducted only local business in Kansas except by device. In fact, his advertisements and his entire contention was that he was doing a purely interstate business and not a domestic business.

However, the plaintiff says, with an assurance that seems to settle the whole proposition: "No one in that case contended that by the delivery of one package from the wagon, all of the remaining packages in the wagon were subject to state regulation." No, we suppose the law of that case was settled upon the facts as they stand, and could not be changed by any one "supposing" or "contending"; but inasmuch as it was an injunction suit by the state, if it had been shown that even one package, or at least if occasional packages, were sold and delivered by Kirmeyer from his wagons on their trips through the streets of Leavenworth, the injunction would have issued and Kirmeyer's business been stopped. It was distinctly found by the court that no such packages were delivered, and that no such sales were made.

However, this case is not like the Kirmeyer case in any respect. To make the cases comparable, we should imagine that instead of the employment of wagons and trains and telephones for the purpose of sending, accepting and filling orders in Missouri and transporting the commodities into Kansas, Kirmeyer had maintained a pipe line across the Missouri river from his warehouses at Stillings, Missouri, into Leavenworth, Kansas, and that he advertised that he would supply all persons who applied at the Kansas end of the pipe line at so much per drink. Would it then be contended that Kirmeyer was engaged in interstate commerce and not running a saloon in violation of Kansas laws?

We have no doubt if the plaintiff's comment on the Kirmeyer case should fall within the attention of Mr. Kirmeyer he would regret sincerely that he had not known that by the employment of so simple a device as a pipe line he could have

set aside all the local regulations of the state of Kansas and maintained his saloon on the Leavenworth side of the river, without let or hindrance from the state authorities.

But let us make the case still plainer by taking one that exactly compares with the present case: Let us suppose that Mr. Kirmeyer was endeavoring to deal in liquors in a state which did not prevent the sale under local laws, and that instead of having his pipe line at Stillings, he had started it at some point in northern Missouri opposite the state of Nebraska; and that he had then projected the pipe line across the Missouri river into that state. That being a citizen of Missouri he could not obtain a license to run a saloon in Nebraska, but had gone into partnership with a citizen of that state who had a license, and supplied the saloon by pipe line, making the sales by the drink or distributing the liquor in such quantities as the daily customers of the saloon desired it.

Would it be supposed that Kirmeyer and his partner were not engaged in business in Nebraska? Would it be contended that they were not subject to all the local regulations of other saloons in the state? If the laws of Nebraska required that all saloons be closed on Sunday could the Kirmeyer saloon hang tin cups on the end of the pipe line and continue to supply its thirsty customers on the Sabbath day in violation of the state law? If not, why is not the Kansas Natural and its partners, agents and joint partners in interest, subject to the same laws and regulations as other utilities in Kansas?

As to the question of orders and the commingling of intrastate and interstate commodities as applied to the Kirmeyer case, there are no orders from customers at the local place of distribution or saloon in Nebraska, and certainly if Kirmeyer attached a small pipe line to the larger one from Missouri, after it passed into Nebraska, and piped the product to the local brewery into the main pipe line, it would make the case of localizing the property so transported even clearer than before.

Now what is the essential difference between Kirmeyer, proprietor of an interstate beer wagon, and Kirmeyer, proprietor of an interstate pipe line delivering intoxicating liquors under the local laws of Nebraska? Manifestly the first difference is in the matter of the original package doctrine. There is no original package where the transportation is conducted



by means of a pipe line. Gas so conducted is not susceptible of delivery in original package. The delivery thus accomplished to customers who demand that the gas be supplied at their meters in such quantities as they may desire for varying necessities of fuel consumption, partakes more of the nature of local delivery by means of a warehouse or the storage within the state of the commodity supplied for the use of the customer.

On the other hand, cases of beer or jugs of whisky, under the *Leisy v. Hardy* decision, are original packages of a commodity recognized in legitimate interstate commerce. Probably this is another way of saying that the intent with which the gas is started on its interstate journey through the pipe line for the purpose of being supplied to all customers who may apply for the same at the end of the pipe line, is entirely different from that with which Kirmeyer, for instance, started his beer or other liquors in original packages upon its interstate journey by wagon or train to be delivered to the consignee who had ordered such original package within the state of Kansas.

Gas is not transported in original packages. There is nothing about its delivery that can resemble in the slightest degree an order, except that the consumer has established a meter and a permanent connection with the pipe line through the local agency of the receiver or transporting company. But there is no order, because he takes the gas or refuses it as he pleases, and in such quantities as he pleases. Indeed, it is proposed that he should pay a different price according as he shall use much or little of the gas consumed. In addition to all this, both the receiver and his agents bind themselves to local regulations by accepting their relation under the laws of the state that amounts to local franchises to distribute gas. This alone should create an estoppel against the Kansas Natural, preventing it from proving that it is not engaged in a local business within the state of Kansas.

We therefore insist that not alone the conduct of the receiver who conducted suit after suit on the theory that the corporation which he represented was engaged in intrastate commerce, but also the very essence and genius of the franchise which gave life to the business of the company in the first place was an admission that the business the company expected to do was intrastate business of a local character, subject to the control and regulation of the state legislature, and this arrange-



ment arose to the dignity of a contract. The obligations of that contract could not be avoided simply because the company found it necessary to obtain a part of its gas supply from another state.

A similar question has recently claimed the attention of the courts of Missouri. The case is *Union Pacific R. R. Co. v. Public Service Commission*, 187 S. W. Rep. (Aug. 16, 1916), p. 827. It was there held that a railroad company, having availed itself of the benefits of a local law, cannot thereafter be allowed to question its constitutionality. Many other authorities to the same effect can be found. The general doctrine is stated in 16 Cyc. 801, as follows:

"If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized as one of the basic facts on which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character."

In the case of *Ficklen v. Shelby County*, 145 U. S. 1, it was held that one who takes out a license and gives the bond for the payment of the license tax cannot afterwards be heard to question the constitutionality of the statute on the ground that the tax would be a burden on interstate commerce.

In the case of *Great Falls Mfg. Co. v. Garland*, 124 U. S. 581, it was held that the complainant could not question the constitutionality of a law establishing a court where the plaintiff had previously invoked the jurisdiction of that court.

In the case of *Gans v. Minneapolis, etc., R. Co.*, 166 U. S. 489, it was held that where a railroad company had instituted proceedings under a condemnation statute and joined issues in a trial for the assessment of damages thereunder it could not afterward deny the validity of a provision of that law allowing certain additions to the verdict for damages.

6 Ruling Case Law, pp. 94, 95, states the general rule as follows:

"Where a complaint is made that an act of the legislature or of an administrative body contravenes a constitutional right, the general rule is that it is the duty of the person whose rights are thus invaded to raise the objection at the earliest available opportunity and to exhaust the remedies which may have been

provided for unreasonable and improper orders before he would be permitted to make an attack in the courts on the unconstitutionality of the statute."

In the case of *Shepard v. Barron*, 194 U. S. 553, the court said:

"Provisions of a constitutional nature intended for the protection of the property owner may be waived by him, not only by an instrument in writing upon a good consideration signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up."

We have insisted from the first of this case that the complainant should not be permitted to assume this Dr. Jekyll and Mr. Hyde attitude. It should not be a local concern, subject to local regulation, while it was making money out of the local gas; then be allowed, when it was to its advantage, to cast off the habiliments of a local concern and assume to be so largely engaged in interstate commerce that its business had absorbed and destroyed the character of all local commerce. This is not a case where the state by an unlawful discrimination is requiring the complainant to agree to an unlawful control of interstate commerce or other discriminatory regulation as a condition of its transacting business in the state. The company is free to engage in any interstate business in Kansas which it may desire.

On the other hand, the contract, which was in reality executed by the complainant, was for the purpose of securing to itself a peculiar advantage as a local concern; that is, an advantage which for exactly the same consideration was conferred by the state upon local corporations. The occupation of the streets and alleys by the company, and even the local regulation, including the fixed rates as well as penalties for delinquent payments by its customers, the right to impose minimum charges, etc., were all contained within the provisions of this ordinance. These were advantages and benefits which the company was quick to seize so long as they were redounding to its sole benefit. Such a contract is not a burden upon interstate commerce, but is a benefit and aid to commerce, placing it upon the same basis as local commerce. The city with this franchise allowed the complainant to enter upon the busi-

ness which the city itself was entitled to transact, to the exclusion of every other company, and this regardless of whether the company was engaged in state or interstate business.

Will it be assumed that because a city owns a water plant, where the source of supply is drawn from across the state line, that the city has lost control of the entire regulation of rates and service of that company, and would this be true even though the plant be a municipally owned plant? Would the city be in any worse condition had it contracted for a water supply with a private company, drawing its source of supply from one state, transporting it across the state line, and supplying the city under local ordinances?

The case of *Grand Rapids & Indiana Ry. Co. v. Chase S. Osborn*, 193 U. S. 17, is absolutely decisive of this point. It was there held that:

"A railroad company, by incorporating under a general act, is estopped to contest the validity, under the Federal constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body."

One of the conditions of the incorporation of this road was a limitation upon its rates for carrying passengers. It was alleged there, as it is here, that that rate applied to interstate business and constituted a burden upon the interstate business of the railroad which extended across the state line. But the court held that:

"Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187, and cases cited. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have

been procured upon stipulated conditions, and repudiate performance of the latter at will."

The case of *Daniels v. Tearney*, 102 U. S. 415, cited in the opinion quoted above, was one where a bond was enforced by this court, although it appeared that the bond was given in pursuance of and under the terms and conditions of a statute passed by a state while in secession and for treasonable purposes, and therefore beyond all question unconstitutional and void.

That an honest difference of opinion may now exist as to whether all of the commerce transacted by the complainant is of a local nature, it seems in all fairness should become immaterial in view of its acceptance of these franchises and its continuance to operate under them. The trial court, however, seems appalled by this view because it involves in a sense a determination of rates according to the local franchises, and therefore the consent of the cities, the state Commission, or other state agency, as to the variation of these rates if they shall at any time during the life of the franchise be discovered to be unreasonably high or low. Hence the court says (rec. 598) :

"Even in the absence of congressional action the exercise of state authority over interstate commerce does not extend to the fixing of rates for the transportation of goods in such commerce. This doctrine was announced before the establishment of the Interstate Commerce Commission and applies not merely to cases where that Commission has jurisdiction in reference to rates, but also in the absence of such jurisdiction."

With due apology to the court, we apprehend that the nature of the commerce involved might have much to do with the application of that rule, and what good reason can there be which would prevent parties seeking to engage in interstate commerce of a more or less local nature, or where combined with other commerce of a local nature, from securing a uniformity of rates and regulations by a binding contract made upon sufficient consideration with a municipal corporation of the state, or any other legal entity capable of contracting?

As to the validity of such contracts, see *Louisville Ry. Co. v. Kentucky*, 183 U. S. 503; *Omaha Water Co. v. Omaha*, 147 Fed. 1; *Allegheny City v. Railroad Co.*, 159 Pa. State, 411-415.

As has already been noted, this commerce in many of its attributes, especially as to distribution and sales, is local in its nature. This undoubtedly furnished the incentive for entering into the contracts referred to above—and while Congress refuses to act in regulating such commerce, assuming it can, there must be some power that controls within this twilight zone hoped to be created by the act of the complainant by withdrawing from his contract; and certainly it must be the power of the state which may act; and if it cannot regulate without contract, surely it may do so when it has one. These views are sustained by the following cases, where the distribution of gas was held to be of a local nature subject to state control:

In the case of *Jamieson v. The Indiana Natural Gas & Oil Co.*, reported in the 12th L. R. A., at page 652, the supreme court of Indiana, on page 658, said:

"Upon this point we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local characteristics and peculiarities, it is a proper subject for state legislation, and can not, so far as regards local protection, be made the subject of general legislation by Congress, or, at all events, that it does 'not require a uniform system as between the states,' for its regulation."

And on pages 659 and 660 it is said:

"We know that the decision in that case affirms that where the whole subject is federal, the states can exercise no power, but that doctrine we neither dispute nor deny; although we do affirm that it is not applicable to such a case as this. In affirming that state police regulations may rightfully operate upon articles of commerce, we do not affirm that commerce may be regulated. If police regulations cannot operate upon articles of commerce, then there are few kinds of personal property upon which they can operate. To deny that state legislation can operate upon commodities that are commercial is to practically annihilate it, for it is difficult, if not impossible, to conceive any species of personal property that is not commercial. But it is by no means only property such as intoxicating liquors upon which the police power of a state may be exercised.

"It is embraced in what Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, calls that 'immense mass of legislation' which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control. 'If the power only extends to a just legislation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.' "

In the case of the *Manufacturers' Light & Heat Co. v. Ott*, reported in 215 Fed. at page 940, an enlarged district court under the statute, composed of Circuit Judges Pritchard and Woods and District Judge Dayton, held:

"A state regulation, fixing the price to be charged by gas companies for natural gas furnished to consumers within the state, is not an unlawful regulation of interstate commerce, although some of the gas supplied is piped from other states; Congress having taken no action affecting the subject."

On pages 944 and 945 the court discussed the question of the authority of the state to regulate this class of interstate commerce as follows:

"We are unable to agree that the fixing of the rates to be charged by complainants to their customers in West Virginia is an unlawful regulation of interstate commerce. The regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the interstate commerce statute. Neither the West Virginia statute nor the orders of the commission purport to interfere in any manner with the transportation of natural gas from West Virginia to other states. Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia to be charged by corporations operating in West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common system of pipes supplying customers in the three states may produce the result that some gas

from Ohio and Pennsylvania comes into West Virginia, although it is undisputed that a much larger quantity of gas goes out of West Virginia into Ohio and Pennsylvania than can possibly come in from these states. But this interflow of gas from one state to another according to the pressure from the main gas pipes as common reservoirs can not affect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. *West v. Kansas Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A., n. s., 1193, relied on by complainants, has no application, for in the present case no effort is made to prevent the transportation and sale of natural gas from West Virginia into other states. It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well-known rule the court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public-service corporation is within the police power of the state until the Congress sees fit to act. The recent and full review of the subject by the supreme court in the Minnesota Rate Cases, *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A., n. s., 1151, leaves room for discussion. The statute falls clearly within the principle there laid down by the court after setting out the limitations on state actions:

“ ‘But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it can not be regarded



as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power.' "

As to the power of the states to regulate rates, although the same may incidentally affect interstate commerce, in the absence of congressional action, see *Chicago, Milwaukee & St. Paul Ry. Co. v. State Public Utilities Commission of Illinois*, 242 U. S. 333, where state regulation of railroad rates from Galewood to Morton Grove, Ill., a distance of twelve miles, was sustained, although directly affecting interstate rates, Congress having taken no action in the premises. On the authority of the *Minnesota Rate Cases*, 230 U. S. 352, quoting from Mr. Justice Hughes in that case, the court said:

"The fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject (*Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. Rep. 214)," until the authority of the state is limited "through the exertion by Congress of its paramount constitutional power where there may be a blending of interstate and intrastate operations of interstate carriers. But it was decided that Congress had not exerted its power by the enactment of the interstate commerce act."

Yet, in the instant case the trial court holds, in the face of this authority, that the willful and intentional mixing of the gas transported from another state with that produced in this state, where all is delivered and distributed under local regulations imposed by the state, but which the importer had agreed to, became interstate commerce because of the intermingling of the imported gas. Do the courts deal with percentages where the importer has for his own benefit mingled his goods, even in the smallest degree, with the goods found in the state subject to the police power?

On the subject of state control in the absence of Congressional legislation, see also *Kane v. New Jersey*, 242 U. S. 162, where the right of the state is upheld to compel the registration of automobiles and the licensing of drivers, although the driver be a nonresident of the state, engaged in an interstate journey, and this power is placed upon the right of the

state in the absence of congressional action to prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways.

Referring to the case of *Hendrick v. Maryland*, 235 U. S. 610, the authority was based upon the right of the state "to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

What reasons can be assigned for sustaining automobile regulation and license taxes and the application of a surplus in money resulting from such acts, over the expense of collecting it, for the benefit of public highways, that cannot be assigned for sustaining regulations permitting the use of public streets by gas companies in the distribution of gas by their pipes and other apparatus necessary to transmit the gas to the dwellings of the patrons? Can it be that the use of automobiles is more damaging to the streets or dangerous to the inhabitants than the piping of gas?

Some of the testimony taken in the instant case indicates that safety to human life itself depended upon the faithful performance of regulations imposed upon the complainant by the ordinances in the piping and distribution of this gas, and if the so-called interstate carriers may invade the public streets and alleys with their pipes, disseminating the gas at their own will, without let or hindrance from state regulations, the cities of Kansas might soon become in a condition similar to the gas-visited districts in the battle fields of Europe. It would purpose little in the meantime that the state might require the registration and licensing of an automobile passing on these very streets, and still be powerless to control locally the matter of so grave an import to the comfort and safety of its people as the distribution of natural gas.

In addition to all this, it appears in this case that the complainant recognized the force of these considerations and agreed before entering upon the business that local regulation was necessary, and acceded to it.

In addition to these authorities, see *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559; *Merrick v. M. W. Halsey Co.*, 242 U. S. 568; *Hall v. Geiger-Jones Co.*, 242 U. S. 539; *International & G. N. Ry. Co. v. Anderson Co.*, 38 Sup. Ct. 370 (April 15, 1918); *Interstate Consolidated Street Car Co. v. Mass.*, 207 U. S. 79.

The proposition of the importer using state agencies for the purpose of distributing his property, especially where the same constitute a part of the local government or an exercise of the police power, is touched upon in the great fountainhead case of constitutional law, *Brown v. Maryland*, 12 Wheaton, 419, where the court, speaking by Mr. Chief Justice Marshall, said:

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate or other furniture used by the importer.

"So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for their service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way.

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine it is because he stores it there, in his own opinion, more advantageously than elsewhere."

The doctrine was also relied upon in the case of *Ficklin v. Shelby*, 145 U. S. 1, already referred to. The case, however, in which the widest attention was given to the influence of local

agencies in the distribution of property imported into a state is probably the Hopkins case, which has already been cited and quotations made therefrom. In this case it appears that the participation of the importer in a contract of a local nature, with individuals wholly disconnected from any part of the state government, will be equivalent to a mixing of his property with the general property of the state, and will deprive his shipments of their interstate character.

So, too, in another great case in which this court was called upon to trace the dividing line between state and federal control of commerce, and the consequent power of the state to regulate or fix rates, this question now under discussion was considered, and here we think is found sufficient answer to the opinion of the trial court to the effect that the commingling of the Oklahoma-produced gas with that found in Kansas does not affect or change the character of the importation. In *Munn v. Illinois*, 94 U. S. 113, the court said, *l. c.* 135:

"It was very properly said in the case of the *State Tax on R. Gross Receipts*, 15 Wall. 293, 21 L. Ed. 167, that 'It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

It is clear that the reason for this holding is that where matters are within the concern of local government, the state may assume control in the absence of congressional action, although such state action may affect interstate commerce, and where such affairs are within the legitimate police powers of the state, action necessary to the protection of its people, interstate commerce shipments are localized by accepting the benefits of state regulation or aids to commerce.

Now the gas situation is this: The distribution and sale of gas for domestic purposes is a business clothed with public interest. It is a business fraught with danger to the inhabitants of the state when carelessly conducted, and it is necessary that the conveyor of the same for sale must have the use of the streets and alleys in municipalities in the conduct of his business. When so conducted it becomes both a natural and an actual monopoly. It follows, then, that the acceptance of a franchise to transact this business under the control of the state is an actual submission on the part of the utility, whether the supply comes from beyond the state line or not, to the local control of the state's police power.

This view of the case was taken by the Circuit Court for this circuit in the McKinney case, which, as has been said, is for all intents and purposes the same case as the instant case. While in other parts of this brief and in our pleadings we have relied upon the fact that this case is an adjudication of this very question, binding as a final judgment upon the parties to this suit, and in certain other parts of the brief that it has settled "the law of the case," we here assert that at least this decision has the force of an authority upon this question, and that the decision being that of the circuit court of appeals of the circuit, the district court should have been bound by the law declared by the court. Passing upon the questions involved the court said, speaking by Circuit Judge Wm. C. Hook, 209 Fed. 300:

"A foreign corporation engaged in interstate and local commerce may be adjudged guilty of a violation of the antitrust laws of the state, its license to do business in the state may be canceled, and a receiver for all its property therein appointed under the general laws in aid of the enforcement of the judgment; and it is no defense that such property included

instrumentalities used by it in conducting its interstate business, or that the corporation by the same course of conduct has also violated the similar laws of the United States."

And again, at pages 306 and 307:

"There remains for consideration the contention that, as applied to this case, the antitrust statutes of the state conflict with the Sherman act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and hence must give way. In this connection it is unimportant that the Kansas Natural Gas Company is a Delaware corporation instead of a corporation of Kansas. The character of its trade and commerce, interstate or local, determines the applicability of the antitrust laws of the nation or state and not the origin of its corporate existence. The term 'interstate corporation' is a convenient colloquialism but hardly accurate. In respect of the contention now being considered, the case would not be different had that company been organized under the laws of Kansas. Nor is it material that it transports some of the gas it deals in from Oklahoma into Kansas and from Kansas into Missouri by pipe lines. By express exemption it is not a common carrier subject to the interstate commerce act (act June 29, 1906, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1284], 34 Stat. 584), sec. 1, even would it matter were it otherwise. The point urged by counsel rests on the fact that the company is engaged in both interstate and local commerce and upon the assertion that the two are so intricately interwoven as to be inseparable. The claim of inseparable intricacy is not tenable. The two kinds of commerce are no more interinvolved than with most railroads of the country and many manufacturing and mercantile concerns. Whatever may be the origin and admixture of the commodity dealt in or the common use of the same plant, equipment, and instrumentalities, the two kinds of commerce are distinguishable. The company is in no better position than if it were an ordinary industrial and mercantile concern of Kansas, producing, buying, shipping, and selling, locally and in other states, grains, oils, or other commodities which lose their particular identity in the mass of that which is dealt in. Again the property and business of the company which are wholly within the state of Kansas are not negligible incidents to which the state antitrust statutes are being forced; much of

its property, including that obtained from the other corporations, is located there and much of its business is there transacted. The action of the state of Kansas was directed to the violation of the state statutes. The decree of the state court was expressly confined to the matters within its jurisdiction and subject to the local laws. There was no attempt to enforce the Sherman act."

In the same case, 206 Fed. 777, it was held, District Judge J. A. Marshall sitting in the case and delivering the opinion, as follows:

"Under the Kansas antitrust act (Gen. St. 1909, sec. 5146), which provides that every person or corporation within or without the state, violating its provisions within the state, shall be denied the right to do business in the state, and authorizes the enforcement of such provision 'by injunction or other proceeding,' a state court has power to appoint receivers of the property within the state of a foreign corporation charged with violation of the act, and under the state practice such remedy is not precluded because the legal relief of ouster is sought in the action.

"The appointment by a state court of a receiver of the property within the state of a foreign corporation engaged in interstate commerce does not amount to an unlawful interference with the right of such corporation to transact interstate commerce."

Considering the question of incidental effect of state control upon classes of interstate commerce upon which Congress had not acted, it was held by the court of errors and appeals in New Jersey, in chancery, in the case of *Benedict v. Columbus Const. Co.*, 23 Atl. 485, that:

"Until the national Congress regulates the transportation of natural gas from state to state, it being admittedly a dangerous commodity, the several states may make reasonable regulation for the protection of the life and health of its citizens against it, and such regulations when not directed against interstate commerce, but only incidentally affecting it, will be necessarily upheld as valid."



In the case of *City of Keokuk v. The Keokuk Northern Line Packet Co.*, 45 Iowa, 196, it is held that:

"Municipal corporations in the exercise of their police power may prescribe wharfage fees and control the landing of boats, designating the places at which they shall receive and discharge passengers."

We earnestly contend, therefore, that there is no basis at all from any view of the transactions in this case for holding that the commerce engaged in by the gas company in the sale and distribution of gas within the cities under local franchises constitutes interstate commerce, over which the state has no supervising control and in which the state has no right to regulate rates.

(g) Interstate Commerce Res Adjudicata.

The trial court in its opinion on this subject said (rec. 588):

"It is further claimed on the part of the Commission that the question in interstate commerce is *res adjudicata*, having been passed upon by the supreme court of the state of Kansas in the case of *The State, ex rel., v. Flannelly*, 96 Kan. 372.

"This contention on the part of the defendant that the question of interstate commerce is *res adjudicata* was presented to the enlarged court, and argued at length, upon the application for a preliminary injunction. That court in its opinion took occasion to discuss the matter, and reached the conclusion that the question was not *res adjudicata*. It is not necessary to repeat what was then said, but it will be sufficient simply to make reference thereto. See 234 Fed. 152.

"It is earnestly contended however, by counsel for the Commission that sufficient consideration was not given by the court to the fact that the state supreme court of Kansas upon the first hearing in the mandamus matter, No. 21324, though denying the writ, nevertheless retained jurisdiction. The position of counsel for the Commission seems to be that the retention of jurisdiction by the state supreme court involved necessarily a finding on the question of interstate commerce, and rendered that question *res adjudicata*.

"There are at least two answers to this contention. First, the retention of jurisdiction by the state supreme court in the mandamus matter was not necessarily based upon such a

finding as is now claimed, for there was in the mandamus proceeding another independent matter which did not necessarily involve the question of interstate commerce, namely, the character of the service which the receiver should be compelled to furnish. The mandamus petition contained a distinct prayer for relief in regard to this latter matter. On the first hearing the court could grant no relief in respect to this matter for the same reason that it could grant no relief in regard to the rate matter, namely, that there was before it no order made by the Commission. That the supreme court retained jurisdiction in the mandamus proceeding, partly at least on account of this matter of service, is apparent from the opinion of the court rendered on the second hearing. At this time also it appeared that the Commission had made no order in regard to the character of the service. The supreme court said:

“ ‘Since it is now conceded that the Public Utilities Commission has made no order requiring the defendants to furnish better or more efficient service the court would not be justified in granting the writ nor in longer retaining the proceeding.’

“Second, there was in the mandamus proceeding no ‘final judgment’ entered of such a character as would render any question in the proceedings *res adjudicata*, or which could be carried by the receiver to the supreme court for review.

“See *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99; *McLish v. Roff*, 141 U. S. 661.”

While there is much in this statement that would seem a fair determination of the questions involved, a closer examination of the state of the record shows that the court was in error on both of the propositions discussed in the opinion. We call attention to the last one first. While the judgment in mandamus was that the proceeding be dismissed, the judgment was in no way comparable to a suit in which the petition had failed to state a cause of action or in which the case had failed to proceed to final judgment. The suit was dismissed because there was nothing against which to direct the writ of mandamus, and this was so because the defendants in that case, plaintiffs in this, had in open court confessed and guaranteed obedience to the writ about to issue. The court had previously held that it had jurisdiction, that it would enforce a reasonable

order of the Commission, that it retained jurisdiction for that purpose, and while the record was in this state the defendants, plaintiffs in this case, confessed judgment by agreeing to perform the commands of the writ asked for.

Besides this, the defendants had filed a pleading for affirmative relief and the issue raised by this pleading had been decided against them, and the very issue raised by that pleading was the issue of interstate commerce. This was a virtual abandonment of its cause in the nature of a retraxit or dismissal of a cause of action in equity. See 1 Van Fleet's Former Adjudication, sec. 37, and following:

"A voluntary renunciation by a plaintiff in open court of his suit or causes of action and a judgment entered thereon is a bar to any further suit upon the same cause of action."—23 Cyc. 1138.

It needs no argument to show that the same doctrine would apply to affirmative defenses, counter claims, and cross claims of a defendant in view of the rules stated above. One of the cases cited in support of the above text is *United States v. Parker*, 120 U. S. 89, where it is said:

"It appearing that the subject of this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be and the same is hereby dismissed. Is held to be a judgment on the merits, final in form and nature, being in the nature of a retraxit, and therefore a bar to a subsequent suit against defendant on the same cause of action."

In the present case the situation is even stronger than in the cases referred to above, for here there was a virtual carrying out or satisfaction of the judgment which was about to be rendered against them. It was more in the nature of a proceeding where the court had found the facts, or a jury had reached a verdict, and the defendant had satisfied the same before judgment had been rendered thereon. On this proposition see 23 Cyc. 1227, note 35:

"A verdict which has been paid without entry of judgment is conclusive."—*Willcocks v. Howell*, 8 Ont. 576.

"The record of a verdict for damages, to be released in the performance of a certain act by defendant, where no motion for a new trial or in arrest of judgment is made, but judg-

ment is not entered on the verdict in consequence of the performance of such act, is conclusive as to the same matter coming directly in question in another suit, unless obtained by fraud or collusion."—*Estep v. Hutchman*, 14 Serg. & R. 435.

This last case is particularly instructive on this point. It seems that in the state of Pennsylvania there was a statute authorizing the guardians to convey property which was under contract of sale at the decease of parents or other testators of minor heirs.

A suit was brought to compel such a conveyance and for damages, with the result as stated above; that is, a verdict for damages to be released in case of the execution of the deed. The defendant guardians immediately complied by conveying the property in question.

In a subsequent suit the court held the former verdict binding and as conclusive as a judgment rendered thereon. In the opinion it is stated:

"Instead of a suit in chancery, and a decree, we have in this case an act vesting the power to convey in the guardians; and, instead of the feigned issue, a real one. No judgment entered, because the acquiescence of the guardians, and their execution of the deed, rendered one unnecessary. *And the want of a judgment of the court comes badly from those who prevented it by instantly conveying. On principle, then, I would consider this as what it was, in fact, a legal determination of the matter now contested, and which would be evidence for the guardians in a suit by the heirs against them; and is evidence for those claiming under Patrick M. Gready. It was once litigated, and determined by proper authority, and with proper parties, and ought not again to be disputed.*"

We contend, therefore, that the judgment in the Flannelly case was conclusive; that it was made on the finding that the receivers were not engaged in interstate commerce, but were engaged in business in Kansas, subject to the control of the Commission.

If the plaintiffs in this case, defendants in the Kansas supreme court, were unable to appeal from the decision of that court on the constitutional question to the supreme court of the United States, it was because of this confession of judgment or their willingness to comply with the order of the Commission

and the court. This did not prevent the questions determined from becoming finally adjudicated. If they had waited and the court had gone further in the proceedings and sustained the Commission's order an appeal could have been had. Instead of doing this they agreed to so much of the judgment as the court had found against them up to date and promised to abide by the order of the Commission.

Recurring to the other point made by the court, that the issue of interstate commerce in the case was immaterial and that the case could have been decided without its consideration, it is impossible for us to see how, if the question of interstate commerce is material in this case it was not material in that. They were exactly the same kind of cases, in fact the same case, except that the so-called Flannelly case was begun before Judge Flannelly in the district court of Montgomery county and this case in the United States district court. Judge Flannelly issued an injunction against the Commission based upon the confiscatory character of the rate as he found it, and in addition thereto enjoined the Commission from further considering the matter because the plaintiffs were engaged in interstate commerce. It was not alone the reversal of this case by the supreme court of Kansas which raised the estoppel, but a mandamus case was brought at the same time on the relation of the state against Judge Flannelly, and the receiver was joined with him in the action as a respondent. The receiver's return to this writ was a plea for affirmative relief on the ground of interstate commerce.

The supreme court, while reversing the case on appeal from Judge Flannelly's court and declaring the law, assumed that Judge Flannelly would act in accordance therewith, and dismissed the writ of mandamus as to him, but did hold the defendant receivers, and through them the company which they represented. The court specifically found that the defendants were engaged in interstate commerce and that it had jurisdiction to enforce an order of the Commission, and would do so against the plaintiffs in this case, defendants in that one.

It is true that as to the judgment rendered in Judge Flannelly's court the question of jurisdiction was the principal one, as is asserted by the plaintiff. But that question was not involved at all in the mandamus suit; or, if so, only in a collateral manner. The principal question involved in the mandamus

suit was, were the receivers of the Kansas Natural Gas Company, operating the property in controversy, a public utility subject to the control of the Public Utilities Commission for the state of Kansas as to the regulation of rates, and, had the Public Utilities Commission for the state of Kansas the power to enforce its orders made against such receivers?

The receivers answered: "No, because we are engaged solely in interstate commerce and are operating instruments of that commerce, over which the state can exercise no control." The receivers said: "We ask therefore that the mandamus suit against us be dismissed."

The court in its decision said: "You are not engaged in interstate commerce; the suit will not be dismissed against you, but we will retain jurisdiction to enforce such future orders as the Commission may make in this proceeding. We can not enforce any present order of the Commission, because the Commission itself has found that the 25-cent rate put into effect, and observed by you voluntarily for years, is noncompensatory, and you interfered by a pretended injunction to prevent the Commission from making an order in accordance with its opinion rendered in a proceeding begun by you. When the Commission has legally completed that order, it will be enforced, and jurisdiction is retained for that purpose."

In order that the court may more fully understand the force of this decision, we desire to call attention to particular parts of the opinion showing just what was adjudicated and the view the supreme court took of this question.

In the statement of the case, at page 276, the court says:

"To this petition R. S. Litchfield and John M. Landon filed their answer September 22, 1915, in which they allege that the business in which they are engaged—that of producing, transporting and selling natural gas—is interstate commerce, and is therefore not under control of the Public Utilities Commission; . . . that unless a reasonable, proper advance is made in the price of gas it will be impossible to continue the operation of business; and that the rates and regulations prescribed in the opinion of the Commission rendered July 16 are unreasonable, unremunerative, noncompensatory and confiscatory, unlawful and void, and will deprive the receivers of the property in their possession and under their control without due process of law, in violation of the fourteenth amendment of the constitution of the United States."

In the syllabus of the case occurs the following paragraph:

"It is no part of interstate commerce to sell natural gas to the consumers thereof in this state, where the gas sold is produced in both Kansas and Oklahoma, and that produced in Oklahoma, after being conveyed in pipe lines to this state, is so commingled, in the pipe lines conveying the same, with the gas produced in this state, that it is impossible to separate or distinguish that produced in Oklahoma from that produced in Kansas, and after being so commingled it is conveyed from city to city throughout the state, and is there sold to the consumers thereof."

And again, in paragraph 5, the court said:

"Assuming that the sale of natural gas produced in Oklahoma, from there transported into this state through pipe lines and here sold to consumers throughout the state, is interstate commerce, it is not national in its nature, it does not admit of one uniform system of regulation, it is not that kind of interstate commerce which requires exclusive legislation by Congress, and until Congress acts it is under the control of this state."

In paragraph 6 of the syllabus, the court said:

"A writ of mandamus will not issue to enforce an order of the Public Utilities Commission before it is fully, finally and completely made."

The final words of the opinion, directing the decree or order of the court, were as follows:

"The demurrer of the Public Utilities Commission to the receivers' petition is sustained, and the injunction against the Commission is set aside. *No writ of mandamus will issue at this time. The action in this court is dismissed as to the Hon. Thomas J. Flannelly, but is retained as to defendants John M. Landon and R. S. Litchfield, for such orders and judgments as may be hereafter made.*"

At pages 384, 385, the court found that the sale of natural gas, under the circumstances disclosed, is not national in its nature, does not require exclusive legislation by Congress, and is subject to state control until Congress acts, and cited in support of this contention *Jamieson v. The Indiana Natural Gas*



*and Oil Company et al.*, 128 Ind. 555, 12 L. R. A. 652, and *Manufacturers' Light & Heat Company v. Ott*, 215 Fed. 940.

Concerning the attempted case sought to be prosecuted by the receivers in Judge Flannelly's court, the court said :

"The receivers asked the court to fix and determine a fair, lawful, reasonable and compensatory rate to be paid for natural gas supplied by the receivers in the state of Kansas. The court fixed a rate of thirty cents. That was not a judicial act. It was legislative, and the legislature has placed the power to fix the rate with the Public Utilities Commission."

Upon the whole, then, the court retained jurisdiction and decided that the Public Utilities Commission has the sole jurisdiction to fix rates. If the Public Utilities Commission did not have jurisdiction because the plaintiff in this suit was then engaged in interstate commerce, this judgment was the denial of a federal right to the receivers and an interference with interstate commerce.

See *Western Union v. Kansas*, 216 U. S. 1.

In the second opinion of the court in the Flannelly case, 96 Kan. 833, it is said :

"The court at that time (of the previous decision) also held that the district court of Montgomery county obtained no jurisdiction over the Commission and that its orders restraining the Commission from enforcing a rate should be vacated and set aside. The court at that time also held that the receivers of the gas company are under the control of the Utilities Commission; that the Commission has the exclusive power to fix the rates to be charged for the service rendered by the gas company while it is being operated by the receivers; *that the receivers are not engaged in interstate commerce, at least that kind of interstate commerce which takes the business from the control of the state.* It was held, however, that no writ of mandamus should issue, for two reasons: *First*, because the Public Utilities Commission had not in fact made a final order establishing a rate to be charged for gas; *second*, because the old rate of twenty-five cents was shown by the findings of the Utilities Commission itself to be unreasonable and confiscatory. *In the opinion it was held that the court would retain jurisdiction of the cause as to the defendant receivers 'for such orders and judgments as may be hereafter made.'*" (Page 834.)

The following quotations from the opinion are important upon this question:

*"This court saw no necessity for prolonging the litigation over rates, and believed that the interests of the public and the parties would be best served by making it unnecessary to go over much of the ground a second time or to thresh out old straw, and therefore retained the cause, so that when the Public Utilities Commission should make such orders as it saw proper to make, either of the parties might in this proceeding have any questions as to rights or duties arising thereon promptly and speedily considered and judicially determined.*

"But it was conceded at the hearing of the petition for removal that the only order issued against the receivers by the Utilities Commission is the order of December 10, 1915, fixing rates, and that this order has been obeyed and enforced by the defendants. . . .

"Since it is conceded that the defendants have obeyed all the orders thus far made by the plaintiff, it is apparent that nothing substantial is left of the original proceeding in mandamus." . . . (Page 838.)

"We have, then, an action pending here in mandamus which is not removable, but the averments of the petition are vague and general; and since it is now conceded that the Public Utilities Commission has made no order requiring defendants to furnish better or more efficient service, the court would not be justified in granting the writ nor in longer retaining the proceeding. It follows, too, that there is no reason why the court should issue an injunction to protect its jurisdiction, and therefore the plaintiff's application for an order to restrain the defendants from prosecuting the suit begun in the federal court will be denied, and the proceeding in mandamus is dismissed." (Page 839.)

It will thus be seen that the judgment of the supreme court satisfies every requirement that the matter adjudicated should be a part of the judgment pleaded as an estoppel. How, then, can it be said that the judgment of the court retaining jurisdiction of the cause and of the receivership for the control of the Commission is not an abiding part of that judgment?

Will it be said that there is no judgment now existing in the supreme court of Kansas in the Flannelly case, or rather the

two cases, *Landon v. The State Commission*, appealed from the district court of Wyandotte county, and the case of *State v. Flannelly et al.*, which was consolidated and heard with it?

Our reply is, there is such a judgment reversing the decision of Judge Flannelly in the district court, to the effect that the order of the Commission was confiscatory, that it was in violation of the interstate commerce clause of the constitution, and enjoining the Commission from proceeding further to fix rates or exercise control over the business of the receiver, and an additional judgment to the effect that the supreme court had jurisdiction to enforce an order of the Commission, that the order in this case had not yet been completed because of the injunction mentioned above, and that the court retained jurisdiction of the subject of the action and of the receivers for the purpose of enforcing this order, and later, on the amended and supplemental petition upon confession of the receivers that they were complying with this order, the suit was dismissed. This is a judgment to the effect that the Commission has jurisdiction to make the order and the court jurisdiction to enforce it, and that it has been enforced because of the voluntary action of the receiver in pleading that he is carrying the order into effect.

Why, then, should the receiver be allowed to play at hide-and-seek between the state and federal courts on a pretended cause for equitable relief? The court records of the country will scarcely reveal a case where the interests of the parties litigant, economy, and the interest of the public all agree in demanding that the litigation should have ceased.

But the trial court says that reasons given for a decree are no part of the decree and the judgment is not conclusive on the proposition of interstate commerce because the question was not necessary to a decision of the case—that it could have been decided on another proposition.

This principle of law has no application where the "reasons" of law or fact enter into and become an essential part, or basis, of the judgment. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the groundwork on which it must have been founded. (10 Encl. of U. S. Sup. Ct. Rep. 758, 759, 761.)

The point of the matter here is to determine what was really

decided in the former cases. It is elementary that this must be decided on the issues made by the pleadings.

(a) In the Flannelly case in the Kansas supreme court the issues were, first, the jurisdiction of the Commission over the subject matter based on inter- or intrastate commerce.

(b) Whether the rate fixed by the opinion of the Commission and interrupted from going into effect by the injunction issued by Judge Flannelly was compensatory.

In the case of *Landon et al. v. The Commission*, attempted to be commenced in the district court of Montgomery county, the issues were the same, except that in this case the question of the validity of the service on the defendant Commission in the Montgomery county court was involved. These two cases were heard together and decided in favor of the state Commission's authority.

In the McKinney case, of which the instant case is a part, under the averments of the intervening petition the issue raised was whether the receiver appointed in the state court on a petition alleging violations of the state and interstate anti-trust law was entitled to the possession of the property as against a receiver in the McKinney case subsequently begun. The plaintiff in that case alleged the negative because the Kansas Natural Gas Company was engaged solely in interstate commerce and the state court had no authority to inflict penalties for the violation of that statute. All of these issues were decided in favor of state Commission or the receiver of the state court on the ground that the Kansas Natural Gas Company was engaged in intrastate commerce. The case is exactly like one where the defendant interposes two or more defenses to one cause of action stated in the petition and is defeated generally on the trial of the case. In such a case are the parties to the suit foreclosed as to the matters determined in each defense, or on only one of them, or on neither? The elementary rule in such a case is that evidence must be taken to show which issue was actually determined, and if both were actually determined against either of the parties to the suit that the determination is final and binding as to each of the issues. The opinion of the court in such a case is competent evidence to show what really was determined by the court. In First Foster's Federal Practice, sec. 132, p. 523, it is said:

"In determining what was decided, the pleadings may be examined. It seems also that the opinion may be considered. It

has been held, however, that the questions concluded by a decree in equity which has been appealed are determined by the opinion of the appellate court and that the parties are not concluded as to questions left open by such opinion, although they were passed upon by the court below."

*National Foundry and Pipe Works v. Oconto Water Supply Co.*, 183 U. S. 216; *Mack v. Levy*, 60 Fed. 51; *United States v. Norfolk & W. Ry. Co.*, 114 Fed. 682; *Russell v. Russell*, 129 Fed. 434.

The opinion in all the cases referred to, and particularly in the *Flannelly* case in the Kansas supreme court, were received in evidence, accepted by the court without objection from the complainants, and at all stages of the proceedings accepted as evidence of what was found by the court, as well as to what proceedings were had in the former trials. The trial court itself treated the opinion as the decree and bases its findings on what is stated therein. (See rec. 588-589.)

In *New Orleans v. Citizens Bank*, 167 U. S. 371, p. 391, the court said:

"Now, to say that this judgment may have proceeded upon other issues or may have been rendered because of some presumed irregularity, without considering the asserted exemption, is to substitute conjecture for the facts unequivocally and conclusively established by the record itself. Under the pleadings only two issues were presented, that the tax was void because under the charter the bank could not be taxed, and that it was excessive; but the judgment did not reduce the amount of the tax—it decreed it to be void."

In *Van Fleet's Res Judicata*, sec. 277, p. 611, it is said:

"If an issue is necessarily decided in reaching the adjudication made, of course it is settled. In an action to recover an installment of interest upon a note, if the sole plea is a denial of its execution and if evidence is given in support of this plea, a judgment on the merits will necessarily settle that issue and bar further controversy concerning it in a new suit for another installment. So, if the defendant, in the case supposed, also pleads payment, and gives evidence to support both issues, a recovery by the plaintiff necessarily adjudicates the falsity of both; while, on the contrary, a recovery by the defendant does

not necessarily show the truthfulness of either, because the record will not show upon which one the finding was made, *unless it was special.*"

If any ambiguity in a decree exists the opinion of the court may be consulted and will govern. (*New Orleans M. C. & R. Co. v. City of New Orleans*, 14 Fed. 373, citing *McDonough's Succession*, 98 U. S. 424, 24 Howard 333; *Smith v. Kernochen*, 7 Howard, 199. See, also, *Van Fleet*, p. 616.)

In *Farwell Co. v. Lykins*, 59 Kan. 96, it was held:

"*Res judicata*—though special findings against notes are silent as to account constituting their consideration, and sued on herewith, judgment for defendant for costs bars subsequent action on account."

In *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 329, it was held that:

"The elementary rule is that for the purpose of ascertaining the subject matter of a controversy in fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

*Russell v. Place*, 94 U. S. 606; *Cromwell v. Sac County*, 94 U. S. 351.

It was held in *Naugle v. Naugle*, 89 Kan. 622:

"The same reason which precludes splitting a cause of action forbids its repeated use to obtain different kinds of relief which could have been had in the first action, and that where the plaintiff was defeated in a suit to compel specific performance of a contract he could not later maintain an action for damages on the same contract, for while in fact the question of damages was not litigated or determined in the former suit, still as such relief was possible and inhered in the cause of action therein set up, the same cause of action cannot be again used to obtain the use which might have been had in such prior proceeding."

For all intents and purposes in this case, the decree of the supreme court in the Flannelly case and the opinion are treated as one and the same thing. This is true as to all the pleadings and averments of the parties, as well as the court in passing upon them. In fact, the opinion is the decree and the order of

the court, and if the decretal part of this order or opinion is ambiguous, certainly all of the opinion must be considered together as evidence of what the court decided. This proposition is certainly sustained by the foregoing authorities.

#### WAS THE FIDELITY TITLE AND TRUST COMPANY BOUND?

Again, the trial court says that "the Fidelity Title and Trust Company, trustee, under the mortgage made by the Kansas Natural Gas Company, was not a party to the mandamus proceeding and is not bound by the judgment therein," etc. (Rec. 589.) This is true as to the parties of record in the mandamus case in the supreme court, but the defendant in the case was the receiver who represented the Fidelity Title and Trust Company, as well as the bondholders and other creditors whom the Fidelity Title and Trust Company itself represented. By virtue of the notable "creditors' agreement," so-called, the receiver in the state court was at the time of the mandamus suit, and for several months before, holding the property, not only as receiver, but as a specific trustee of all the creditors of the Kansas Natural (rec. 1009), the language of the stipulation being "in the interest, first, of the public service; second, of the creditors; and third, of the stockholders and the company."

It is true that the Fidelity Title and Trust Company did not sign this agreement, but its attorney, Charles Blood Smith, Esq., signed the agreement as counsel "for 75 percent of the Kansas Natural first-mortgage bondholders." These were the same bonds, or at least the larger part of them, represented by the Fidelity Title and Trust Company. But inasmuch as the so-called creditors' agreement was approved by the court and made a part of its decree, the receiver from that time on represented all of the creditors, whether parties or not to that proceeding, and such creditors were bound by suits prosecuted in the name of or against the receiver. There should be no dispute about this proposition of law. The rule, as stated in 23 Cyc. 1248, is as follows:

"It is also generally held that the assignee or receiver represents the whole body of creditors, so that all of them are bound by the results of proceedings by or against him, whether joined as parties or not."

See, also, *Atlantic Trust Co. v. Dana*, circuit court of appeals, eighth circuit, 128 Fed. 209. This case settles the law



in this circuit in harmony with the general rule stated in Cyc. As to the effect of the appearance of counsel of the Fidelity Title and Trust Company and his participation in executing and making effective the creditors' agreement, see Cyc. 1268.

Moreover, the same state of facts upon the same issues as to interstate commerce were tried in the McKinney and the Fidelity Title and Trust Company cases, and this is stated in our answer and relied upon both as an adjudication of the issue of interstate commerce and as a decision declaring the law of the case which bound both McKinney and the Fidelity Title and Trust Company. (Rec. 124-125.) In this case all of the parties to the present suit were parties to the proceedings—the plaintiff receivers, the trustees, John L. McKinney, the defendant Commission, and the State of Kansas through its attorney-general, and also the receiver of the state court himself, who was then holding the property in the district court of Montgomery county at the suit of the state, and therefore representing the public generally, including all state officers. (See I Foster Fed. Prac., sec. 132, p. 519, citing *Compton v. Jesups*, 68 Fed. 263, per Taft, Jr., also on appeal, 167 U.S. 1.)

In any event the receiver was bound by the judgment in the state case in which he was appointed and by the judgment in the Flannelly case, and McKinney and the Fidelity Title and Trust Company were bound both by adjudication and the law of the case as declared by the court of appeals in the cases brought by them.

It thus appears that each and all of the defendants in some proceedings connected with the main suit, to which this suit is alleged to be ancillary, have been concluded by a judgment resulting from actual litigation by issues made on this question of interstate commerce, and in each and every case the courts have found that the business of selling and distributing gas to the consumers at the meter tips was not interstate commerce.

**The Law of the Case.** The plaintiff is estopped, because the propositions of law contended for by him as to interstate commerce and the consequent authority of the defendant Commission have been settled in this suit.

We plead in our answer in paragraph six R that it has been held in this same suit, on appeal and otherwise, as a matter of

law, that the plaintiff and the property under his control as instruments of domestic commerce within the state of Kansas are under the control of the defendant Commission.

As stated in a previous division of this brief, it is not claimed that there is any change of conditions of fact. There is no application to amend or modify the previous pleadings or statements of fact, or to apologize for them in any way.

We assert that if it be true, as alleged by the plaintiff, that this suit is dependent upon, ancillary to and really a part of the original suit of *John L. McKinney et al. v. The Kansas Natural Gas Company*, No. 1351, etc. (plaintiffs bill, p. 3), then it follows that this question of whether the Kansas Natural Gas Company is engaged in interstate commerce was decided upon appeal in this same case by the circuit court of appeals against the present contention of the receiver, as well as in the Flannelly case appealed from the district court of Montgomery county, and that he is now estopped to assert a different theory of law as applied to these facts, and the court is bound to adhere to its previous decision.

It was argued by the plaintiff, and approved by the trial court, that the reasons given for the prior decision are not a part of the judgment and do not bind the parties; but under the doctrine termed "the law of the case," the reasons of the decision, or in other words the statement of the law thereof, are binding upon the court and all parties to the proceedings in the subsequent course of the case.

Necessarily, this proposition is dependent upon the proposition that the various suits referred to in the pleadings herein constitute one action, or suit, in equity; but we understand this proposition is conceded by the plaintiff, indeed, it is pleaded by him. The statement, therefore, by the plaintiff in his brief of the modifications and limitations of the doctrine of *res adjudicata* has no application to the doctrine of "the law of the case."

Perhaps the most recent statement of this doctrine by the supreme court of the United States is found in the case of *Messinger v. Anderson*, 225 U. S. 436, 56 L. Ed. 1152. It is there stated in the syllabus of the case:

"The phrase 'the law of the case,' as applied to the effect of a decision of an appellate court in an earlier appeal in the same case, merely expresses, in the absence of statute, the

practice of courts generally to refuse to reopen what has been decided, and not a limit to their power."

This does not mean, however, as it is clearly shown from the decisions following, that where a question has been fairly and fully presented to a court on appeal and decided that the parties may thereafter act in contradiction of the rule of law declared by the court on the prior appeal.

A very clear statement of the rule is also made by the circuit court of appeals of this circuit in the case of *Brown v. Lanyon Zinc Company*, 179 Fed. 309, Judges Sanborn and Van Devanter and District Judge Munger sitting. The court, speaking through Judge Van Devanter, in the syllabus, said:

"Propositions of law once considered and decided by an appellate court in a given case are not open to reconsideration in that court, upon a subsequent appeal in the same case, and this, although the first appeal was from an interlocutory decree."

The United States circuit court of appeals of the sixth circuit in *Western Union Telegraph Company v. City of Toledo*, 121 Fed. 734, considered as a case similar to the present case. There the controversy arose over the right of a public utility to act without the consent of a municipality of the state of Ohio. The utility in that case, the Western Union Telegraph Company, applied to the circuit court for an injunction to prevent the city from interfering with it in placing certain poles and boxes, necessary to the construction of its telegraph system, upon the streets of the city.

On appeal from this injunction, the circuit court of appeals reversed the case and held that it was necessary for the telegraph company to procure the consent of the city as to the location of the parts of its plant sought to be erected. The telegraph company then appealed to subordinate city officers for a permit, but these officers refused to act, because of lack of authority. On a second appeal, the court held that the determination of the legal questions, made upon reversing an order granting a preliminary injunction, became the law of the case, and refused to consider a second appeal.

We call the attention of the court, also, to the case of the *People of the State of Illinois, ex rel., v. Illinois Central Rail-*

*road Company*, 184 U. S. 77, 46 L. Ed. 440. In this case is summarized the somewhat famous litigation over the lake front at Chicago, and, like the present case, involved various proceedings in different courts. The statement of the rule of "the law of the case" is as follows:

"Every matter embraced by a decree of a United States circuit court, and not left open by a decree of the United States supreme court affirming the former decree in all respects but one, and as to that one remanding the case for further investigation of the facts upon which it depended, is conclusively determined, as between the parties, by such affirmation, and is not subject to reëxamination on a second appeal."

In the opinion of the court it was said:

"In *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167, this court said: 'A final decree in chancery is as conclusive as a judgment at law. (1 Wheat. 355, 4 L. Ed. 110; 6 Wheat. 113, 116, 5 L. Ed. 219, 220.) Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (3 Wheat. 591, 4 L. Ed. 467; 3 Pet. 431, 7 L. Ed. 731); or to reinstate a cause dismissed by mistake (12 Wheat. 10, 6 L. Ed. 534); from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. . . . Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They can not vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided upon appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. . . . After a mandate, no rehearing will be granted, . . . and on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate. (5 Cranch, 316, 3 L. Ed. 112; 7 Wheat. 58, 59, 5 L. Ed. 397; 10 Wheat. 443, 6 L. Ed. 362.)'

"In *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969, 973,

the court said: 'On the last trial the circuit court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we can not be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. . . . We can notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial.' To the same effect are numerous cases cited in the margin."

In the case of *District of Columbia v. Brewer*, circuit court of appeals, District of Columbia, 37 Washington L. R. 65, it was held that where there was a reversal of an appeal and a new trial, the trial court erred in following an intervening decision of the highest court inconsistent with the ruling of the reversing court.

Perhaps no other authorities are necessary to establish the rule we contend for, that the courts and all the parties therein are bound in a subsequent proceeding by a declaration of the law on appeal, which we have already cited in previous divisions of this brief, and which is binding applicable here.

The whole theory of the plaintiff's case, from first to last, prior to the filing of this proceeding, has been that the facts and circumstances of the business of the Kansas Natural Gas Company constitute the transaction of domestic trade within the state of Kansas. The proposition was squarely submitted to the circuit court of appeals in this case, 209 Fed. 300; and the court there held that the contention of the receivers was

then correct, and we can think of no possible reason why every syllable of the decision of the supreme court of the United States in the Illinois Central case, *supra*, is not applicable here.

There is no excuse why this receiver should be allowed to continue endless litigation over a question that has been finally settled in this same litigation years ago at the expense of an alleged bankrupt estate.

We urge, therefore, upon the question of estoppel, that we have shown that there is a binding judgment both in the United States courts in this suit and in the supreme court of the state of Kansas against the defendants, determining that they were subject to the control and jurisdiction of the defendant Commission.

That the plaintiff is estopped by his own pleadings and representations of fact previously made in this case on the same proposition; and that he is bound by the doctrine of "the law of the case" to every application of the law necessary to sustain these conclusions.

### **WANT OF EQUITY IN THE PLAINTIFF'S BILL.**

The appellant Commission and cities of Kansas deny that there was any ground for equitable relief stated in the plaintiff's bill or shown in the evidence in this case.

It was conclusively shown that the plaintiff receiver had an adequate remedy at law in suits pending at the time he began his case in this court, and that he secured the dismissal of the cases in the law courts by misrepresentation of facts and want of good faith.

Under this heading will be discussed the want of equity as shown by the plaintiff's bill of complaint. The question of equity as shown by the evidence will be discussed in connection with the merits of the case upon the rate order of the Commission. (See this brief, page 117.) The court in its opinion in the Kansas case (rec. 570) said:

"At the hearing upon the application for a preliminary injunction before the enlarged court, the jurisdiction of the court was challenged by the Public Utilities Commission as well as by other defendants, upon various grounds set forth at length either in their answers or in separate motion papers. The court held that it had jurisdiction; its opinion upon that ques-

tion is found in vol. 234 Fed. 152, 154. Upon the final hearing the jurisdiction of the court has again been challenged, largely upon the same grounds. So far as the grounds are the same, I do not deem it necessary to make any statement, except the reference to the prior decision already mentioned."

As this opinion refers to the opinion upon the temporary injunction, we quote from that as follows:

"It is insisted that the fact that the receiver put in force the 28-cent rate fixed by the Kansas Commission is a bar to its application to this court to consider whether or not the rate is compensatory, or confiscatory, or violative of or an interference with interstate commerce, and that for that reason he may not apply to this court. But it has frequently been the practice of the courts, when one came to it to ask such equitable relief as is here sought, to require as a condition to listening to the application that the rates fixed by the Commission should be first tested, and then the matter should be determined as to whether or not they were confiscatory. And it cannot be that a course that has become so common with the courts, and an act which they have frequently required a litigant to do before he should be heard in his appeal to them, can deprive a litigant of the right to appeal for relief."

In neither of these opinions is it considered that the rates were put into effect voluntarily. The opinions proceed on the theory that the defendants were objecting because the plaintiff had put the rates into effect pending this litigation. It is entirely a different matter to put rates into effect voluntarily than to put them into effect with the consent of the court after the litigation has been begun over them.

Our objection goes to the point that there can be no confiscation of the property of a utility by the operation of rates which it itself put into effect. The essentiality of the constitutional provision against confiscation of property is that "property shall not be taken without due process of law." There cannot be said to be want of due process of law where the rate-making body took action by and with the consent of the party proposing the rates, or where the rates were put into effect by consent. It is true that rates put into effect voluntarily may later become too low, and it will then be proper for the utility



to apply for permission to raise them. But such application must needs be made to a legislative and not a judicial body.

We repeat that the only order, by which these rates became the legal rates, was made upon the application of the plaintiff itself for permission of the defendant Commission to put these rates into effect. The Commission granted all that he requested, and this order cannot be the cause for complaint in a judicial controversy until it is shown that the plaintiff in this case has presented his case to the proper local authority for relief and been refused.

The plaintiff, however, seeks to justify his observance of these rates on the ground that they were put into effect under protest. As was said in our former brief, this is little short of absurd. Protest, as used in such a proceeding, means restraint or duress. It is only allowed under the law of Kansas where there is immediate or probable cause for believing that unless the person claiming such privilege makes a payment or does some other act, he will be subjected to penalties against which he has no legal relief and no opportunity to protest legally in due course of law. *Ottawa University v. Stratton*, 85 Kan. 246.

That no duress existed here is shown conclusively by the fact that the statute under which the mandamus proceeding was being prosecuted—section 38 of chapter 286, Laws of 1901, 7227 G. S. 1909, and section 39 of the same chapter, 7228 G. S. 1909—provides that when a suit has been brought under either of these sections, no penalties or forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the regulations or orders sought to be vacated or modified in such action, until the validity of such regulation or order shall have been finally determined in such action, or shall have been finally determined by the supreme court of Kansas in any proceeding to which said railroad company is a party. *Alabama R. Co. v. R. R. Commission*, 203 U. S. 496.

These sections will be referred to hereafter, but this is sufficient to show that plaintiff in this case was under no compulsion whatsoever to obey these orders for at least thirty days after they were made, that the rates proposed by him were adopted by the Commission, and, indeed, as is hereafter shown, the suit was then pending in which the reasonableness of the order could have been determined.

Under these circumstances the act of the receiver in putting into effect these rates was purely voluntary and it cannot be said that it was done without due process of law.

**Plaintiff has not pursued the legal remedies provided by the statute of Kansas for the injury complained of, and has full relief in due course of law.**

Here the court, rendering its final opinion, again refers to and adopts the opinion of the court on the temporary injunction, and on this matter the court there said:

"It is said that the receiver had a remedy at law in the mandamus case in Kansas, in the state court, and that consequently there is no jurisdiction of this court in equity, because one may not apply to a court of chancery where he has a plain and adequate remedy at law. The answer is: First, the remedy at law, which will prevent the appeal to a national court of equity, must be a remedy at law in a national court. A remedy at law in a state court will not ordinarily have that effect. And, second, in order to bar the remedy in equity, the remedy at law must be as prompt, complete, efficient and adequate as the remedy in equity which the court of equity may grant. The remedy at law which might have been obtained in the mandamus case is neither of these, and for that reason it does not bar the remedy in equity in this court, if there are facts to sustain the application."

Of course it was not contended by the defendants in the court below, and is not now contended, that under ordinary circumstances the federal court would not be a court of competent jurisdiction to try the constitutional question of whether plaintiff's property was being confiscated by an unreasonable rate. The statutes of Kansas, and the statutes of every other state, recognize the right of citizens of the state to appeal to the federal courts to redress rights guaranteed by the federal constitution, and these citizens would have such right regardless of such statutes.

*The question sought to be presented in the court below was that the plaintiff was not free to pursue his remedy in the federal court because of the fact that the statutes of Kansas provided him a remedy for the wrong he complained of, and that this process had been started and was still in progress when he*

abandoned it and appealed to the federal courts. We said then, and we still affirm, that having availed himself of this procedure the plaintiff cannot leave the state court before final judgment is reached and appeal to the federal courts. All that was said in the prior part of this brief concerning the character of the judgment in the Flannelly case, and the manner by which the plaintiff extricated himself from that jurisdiction, is applicable here. Indeed, it might be well argued that by his conduct in assuring the supreme court of Kansas that he was obeying the order; that he had submitted himself to the jurisdiction of the Commission; that he refused to raise the defenses which were open to him in that suit; that the defendant has estopped himself from raising any defense whatsoever upon this cause of action in another court. We have not urged this, as it seems to us that the want of equity in his bill arising out of the consideration of the comity of the courts is more reasonable and more in accord with the practice and decisions of the federal courts. We quote from the opinion of the supreme court of Kansas, describing the nature of its judgment on the first hearing in the Flannelly case and what it deemed its jurisdiction to be in the second hearing. This language is found in 96 Kan., p. 833:

*"The court saw no necessity for prolonging the litigation over rates, and believed that the interests of the public and the parties would be best served by making it unnecessary to go over much of the ground a second time or to thresh out old straw, and therefore retained the cause, so that when the Public Utilities Commission should make such orders as it saw proper to make, either of the parties might in this proceeding have any questions as to rights or duties arising thereon promptly and speedily considered and judicially determined.*

*"But it was conceded at the hearing of the petition for removal that the only order issued against the receivers by the Utilities Commission is the order of December 10, 1915, fixing rates, and that this order has been obeyed and enforced by the defendants."*

Here, then, is the view of the supreme court of Kansas of the legal proceeding then pending before it, and in which the defendant Commission and the receivers who begun this action were parties. The action was not only pending in this way, but the receivers were brought into court and confronted

with the proposition that the court had jurisdiction to settle whether the order of December 10, 1915, or any previous order of the Commission, was a legal one. But the receivers waived this right, declined to accept relief from the court, by pleading affirmatively that they were complying with the order of the Commission. Can they thus spurn the jurisdiction of the highest court provided under the state law and then successfully allege in a court of equity that they are and have been without due process of law for redress of their alleged injuries? We think such a course destroys the comity and the usual doctrine of equitable relief.

While under the constitution the supreme court has original jurisdiction in mandamus, it has been held that this means jurisdiction in mandamus as it existed at common law; but it has also been held that the legislature may create new causes of action in mandamus and that the court has jurisdiction in suits involving such causes of action.

Early in the history of the regulatory statutes of the state relating to common carriers and other utilities, it was provided, section 38, chapter 286, Laws of 1901, paragraph 7227,\*

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\*NOTE: Section 38, chapter 286, Laws of 1901, is as follows:

"It shall be the duty of every railroad company, and each and every officer, agent and employee of any railroad company, and of each and every person engaged in any capacity in the conduct of the business of a common carrier, to obey all reasonable orders of the Board of Railroad Commissioners made under the authority conferred by this act. In case any railroad company, or any such officer, agent, employee, or person, shall violate or shall refuse or fail to obey any such order lawfully made by said Board of Railroad Commissioners, any person aggrieved thereby may institute and prosecute mandamus proceedings in the supreme court, in the name of the state on the relation of such person, to compel compliance with and obedience to such order; and in any case where in the opinion of the Board of Railroad Commissioners the interest of the public requires it, such board shall require such proceeding to be brought, and such proceeding shall then be brought by the attorney-general in the name of the state. The practice in such proceedings shall be as in other cases of mandamus, but the court may control the time of trial without regard to the time the issues are joined. Cases instituted under the provisions of this section may have precedence as to the time of hearing over all other classes of cases except criminal cases. The supreme court shall have discretionary authority to refer any of the issues in any such proceeding to a referee or referees to be appointed by the court for such hearing and findings, and under such rules as the court may direct. In any hearing under the provisions of this section, the orders and determinations of the Board of Railroad Commissioners

G. S. 1909, that the Railroad Commissioners could compel the compliance and obedience of any order made by them by an action in the name of the state, brought by the attorney-general, or by the said board, and that such proceeding or order of the board should be *prima facie* evidence of its reasonableness; but the court could hold the same or any part thereof unreasonable and refuse to enforce such part without affecting the part found to be reasonable or just.

It was provided that cases instituted under that section of the law should have precedence over all other classes of cases except criminal cases, and that the court (section 39) should have power to stay all proceedings brought in the district courts of the state to test the reasonableness of such order during the pendency of the suit in the supreme court.

These provisions of the law were adopted and made part of the public utilities statute, chapter 238 of the Laws of 1911. See, also, section 39 of that law.†

shall be deemed *prima facie* evidence of the matters therein stated and found. In such action the court may direct the railroad company affected thereby to comply with any part of any rule, order or regulation of the board, and may hold any part of the same unreasonable, and refuse to enforce such part, without affecting the part found to be reasonable and just. Disobedience of any judgment, order or writ of the supreme court in any such proceedings shall be punished as in other cases of contempt. The proceedings in cases of contempt shall be summary in their nature, under such rules as the court shall adopt, and no jury trial shall be required or had therein. In addition to the general powers of the court to punish for contempt, the court shall have power to punish any refusal or failure to obey its orders, made under the provisions of this section by a fine of not to exceed one thousand dollars for each day after a day to be fixed by the court that such obedience shall continue, or by imprisonment not exceeding one year, or by both such fine and imprisonment. In any proceeding instituted under the provisions of this section by the attorney-general, the costs and expenses on the part of the plaintiff shall be paid out of the general fund of the state, upon approval by the governor, attorney-general, and auditor of state. The remedies provided by this section shall not be deemed to exclude or limit any other remedies provided in this act or existing in virtue of any other statutes or common law, but shall be additional thereto." (Sec. 8446, G. S. 1915; L. 1901, ch. 286, sec. 38; March 29.)

†NOTE: Section 39, chapter 286, Laws of 1901, is as follows:

"Said Board of Railroad Commissioners shall not make any regulation or order against any railroad company or enter into any investigation affecting any railroad company without giving such railroad company reasonable notice thereof and an opportunity to appear and be

Section 39 of this chapter provided that when a suit was brought by the railroad company (or public utility) in a district court of the state, that the supreme court should have power to stay the proceeding in the district court until the suit in mandamus brought under section 38 of that chapter should be concluded, if one had been so brought and was being so prosecuted at the time. *Not only this, but the section provided that when suit had been brought by a railroad company or was pending in the supreme court in which a railroad company was interested, that no penalty should accrue under the law for disobedience of an order made by the board (Public Utilities Commission). These provisions of the law were carried forward into the new public utility law of 1911. See sec. 2, chap. 238, Laws of 1911.* The supreme court has construed this to mean that all of the powers possessed by the railroad board

heard in respect to the same, except as is provided by section 10, chapter 286, Session Laws of 1901, as amended; and if any railroad company shall be dissatisfied with any regulation or order adopted by said Board of Railroad Commissioners such dissatisfied railroad company shall have the right, within thirty days after the making or entering thereof, to bring an action against said Board of Railroad Commissioners as defendants, in any court of competent jurisdiction, to have such regulation or order vacated, and shall set forth in the petition the particular regulation or order complained of and the particular cause or causes of objection to any or all of them, and a summons shall be served upon the secretary of said board as in other cases. Issues shall be formed and the controversy tried and determined as in other civil cases of an equitable nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted by the said board which shall be found to be unreasonable, unjust, oppressive or unlawful, without disturbing others; provided, that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted except on hearing, after not less than five days' notice to the commissioners. Either party to said cause, if dissatisfied with the judgment or decree of said court, may institute proceedings in error in the supreme court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and proper in the premises. In all litigation under this section, the said board shall be entitled to the services of the attorney-general in its behalf, as well as those of the attorney for the board, and the costs incurred by them shall be paid by the state. All actions brought under this section shall be advanced, upon application of either party thereto, and in the hearing thereof shall have precedence over all other causes except criminal cases, to the end that the same may be speedily heard and finally determined. The institution of any such action by any railroad company shall in no manner interfere with or prejudice the

over railroads have now been given to the Public Utilities Commission over all public utilities. *Kansas v. Kansas Postal Telegraph Co.*, 96 Kan. 298.

True it is that the Public Utilities Commission law also provided that the Commission might enforce its orders by a mandamus in the supreme court, and that public utilities aggrieved on account of the unreasonableness and confiscatory nature of an order or regulation might bring suit to set aside the same in a court of competent jurisdiction, but these provisions added nothing to the law as it then existed, and as stated heretofore, they were wholly unnecessary, and at least conferred no powers upon a utility or a railroad not possessed by either of them under general law or by these provisions of the constitution. These general provisions did not repeal, modify, or limit the effect of the specific provisions of the statute which provided for a logical procedure by which the Commission itself could procure a decree of the court as to the reasonableness of its order.

Therefore, to hold that this court, the district court of the United States for the district of Kansas, was included within

rights of said board or any other party in interest from availing itself of the remedies provided in section 38 of this act; but whenever action shall be brought by any railroad company under the provisions of this section within the said period of thirty days, no penalties or forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the regulations or orders sought to be vacated or modified in such action until the validity of such regulation or orders shall have been finally determined in such action, or shall have been finally determined by the supreme court of Kansas in any proceeding to which said railroad company is a party. When ever a proceeding brought in the supreme court under section 38 of this act by the attorney for the board, or the attorney-general, upon the direction of the Board of Railroad Commissioners against any railroad company to compel the compliance with any order of said Board of Railroad Commissioners, shall be pending at the same time with an action brought in any district court of the state by such railroad company to vacate such order, the supreme court, upon such fact being made to appear, may stay all proceedings in said district court in said cause, so far as relates to the subject matter involved in such proceeding in the supreme court, until the final determination thereof by the supreme court; and, if said proceeding in the supreme court result in a final decision upon the merits, determining the question of the validity of such order, said district court, upon the facts being made to appear shall render judgment in accordance with such decision of the supreme court." (Sec. 8447, G. S. 1915; L. 1901, ch. 286, sec. 39, as amended by L. 1907, ch. 268, sec. 8; March 20.)



the term "competent court of jurisdiction" as used in section 39, chapter 238, Laws of 1901, would mean that the supreme court of Kansas would have power to stay a suit brought in this court until the supreme court had determined any suit in mandamus brought to enforce an order of the Commission either before or subsequent to the commencement of the suit in the federal court. This, of course, could not be the law. It should rather be held that a suit having been begun in the supreme court of Kansas by the Commission to enforce its order, that the federal courts, through comity, would not entertain another suit for the same cause until the highest court of the state had concluded its determination.

It is certain, under the provisions of section 266 of the judicial code, that had the case in the supreme court of Kansas continued, and the defendant there, now the appellee, had chosen to present the reasonableness of the order complained of to that court, that the action in the federal court would have been stayed pending the final determination of the suit in the state court. Moreover, the court itself in this very suit held in accordance with these views, in a controversy arising over the rates between the gas company of St. Joseph and the Missouri commission, which was made a part of the original bill of complaint; the temporary injunction was at first denied without prejudice to another application. The Missouri commission immediately began a mandamus suit in the state court to enforce the rate. Thereupon the St. Joseph Gas Company renewed its application for a temporary injunction, and the same was heard by Circuit Judge Smith and District Judges Booth and Campbell, at Council Bluffs, Iowa, on July 28, 1916, and the application was denied, for the reason that a suit was pending in the state court and that the federal court was without jurisdiction to issue an injunction against the state officers preventing them from enforcing the order of the commission while a suit was pending in the state court to test the validity of such order. We understand that no opinion was written on this order.

Was it not the duty of the receiver to have applied to the supreme court in this pending suit for relief before filing his petition of December 28, if he believed the Commission's refusal of its petition of April 9, 1915, was illegal and confiscatory of his property? The plaintiff certainly cannot be allowed

to refuse to litigate the reasonableness of the orders of the Commission in a law proceeding in the highest court of the state, thereby inferentially admitting the legality of the Commission's order, and then fly away to a court of equity for an injunctive order. Such conduct not only condemns his cause of action as lacking equity, but flies in the face of the doctrine of the comity of courts which, in previous proceedings in this suit, the plaintiff has relied upon as important indeed.

We believe this matter has been well settled by the federal courts, and that if precedents be followed, this case should be reversed.

The case of *Boston and M. R. R. v. Niles*, 218 Federal, 944, was a proceeding in the United States district court under the act of March 3, 1911, for a temporary injunction, as this one was. The case was heard before Circuit Judges Dodge and Bingham and District Judge Aldrich, and it was there determined by the two circuit judges and one district judge, under facts almost identical with this, that the injunction should be denied.

For the purpose of getting the facts in this case we quote the second paragraph of the syllabus, as follows:

"A statute of New Hampshire dealing with the subject of railroad fares also created a public service commission, with judicial powers to carry out its provisions. The act provided that, in case a petition for rehearing on any matter should be denied by the commission, an appeal should lie to the supreme court of the state. A railroad company filed a petition for a rehearing after a decision by the commission, raising the issue of the constitutionality of the statute, which petition was denied. Thereupon the company commenced a suit in the federal district court, alleging that certain provisions of the statute were discriminatory on their face and unconstitutional. *Held*, that having first invoked the jurisdiction of the state tribunals, the federal court would not pass on the constitutionality of the statute, or grant an injunction restraining its enforcement, until the company had exhausted its remedies in the state courts, but that until such time the cause should be held in abeyance."

It will be noted here that while the supreme court sustained the circuit court in refusing an injunction in the familiar case of *Prentis v. The Atlantic Coast Lines*, 211 U. S. 210, the court

there based its decision upon the fact that the matter pending in the state court was legislative and not judicial, and that a court of equity could not interfere before the legislative machinery provided for by the state constitutional law had been fully carried out. But in this case the court holds that although the matter pending or begun in the state courts was purely a judicial question, the federal court of equity, or for that matter any other court of equity, should not take jurisdiction to grant an injunction until the jurisdiction of the state court (court of law) had exhausted its jurisdiction.

It certainly follows that the party could not confess judgment in the state court or by any act of his own thwart the jurisdiction of that court and then apply to another court for relief. This would be the plainest kind of a case where a party had waived his rights in a court of law and then claimed in an equity court that he was without adequate remedy at law.

The first paragraph of the syllabus in the above case is as follows:

"The rules of comity existing between the federal and state courts mean something more than rules of convenience, and, while a federal court has undoubted jurisdiction of a suit to determine the constitutionality of a state statute, except in extreme and exceptional cases, the state court, which has concurrent jurisdiction and on which the constitution and laws of the United States are equally binding, is the appropriate court to deal with the question in the first instance."

For the convenience of the court we reprint the entire decision of the court on this question:

"(1) While we do not doubt the jurisdiction of the United States courts, or their power to entertain questions like these here, in an original and independent proceeding instituted for the purpose of testing the constitutionality of state statutes, which it is claimed conflict with the federal constitution, we do think that such a proceeding in certain circumstances is subject to being controlled or influenced by preliminary considerations involved in rules of comity existing under our judicial system, and these rules are now accepted as meaning something more than rules of convenience.

"It was pointed out in the Houseman case, 93 U. S. 130, 136,

137, 23 L. Ed. 833, that, while the jurisdiction of the federal courts was the jurisdiction of a paramount sovereignty, the laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws; that legal and equitable rights acquired under either system may be enforced in any court of either sovereignty competent to hear and determine; that in respect to matters, though federal, unless otherwise provided, a remedy may be had upon proper proceedings in the state court, because, though the state courts derive their existence and functions from the state laws, such courts are subject also to the laws of the United States and just as much bound to recognize these as operative within the state as they are to recognize the state laws; that the two together form one system of jurisprudence, which constitutes the law of the land for the state; and that there is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States to which their jurisdiction is competent and not denied. It has come to be pretty generally understood, we think, that state courts, in respect to federal rights involved in a proper proceeding before them, are under the same duty to enforce the federal law as that which imposes itself upon the federal courts. This is because the federal law is a part of their own system, and the state courts have gone as far in saying this as the federal courts.

"Still, in respect to the question as to where remedy shall be had for supposed invaded rights, which depend upon the federal constitution or upon a state constitution, or partly upon both, as well as in respect to other rights about which jurisdiction is concurrent, much depends upon the question as to where the proceeding to establish the right is first instituted.

"In the case of *Covell v. Heyman*, 111 U. S., at page 182, 4 Sup. Ct. 358, 28 L. Ed. 390, the supreme court said:

"The forbearance which courts of coördinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the

United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.'

"The reasoning to which we have referred is very general, and has reference to all rights in respect to which there is concurrent jurisdiction. The results of the reasoning of this case, and others, is that when rights have been put at issue in a state court, even though the right of ultimate review may reside with the court of paramount sovereignty, rules of comity require that the state court whose process has been first invoked shall have a free hand under the presumption that the right will be suitably established, and this view is understood to hold good until the reasonable remedies in the state courts have been exhausted and a decision reached which aggrieves one of the parties, and then, if the supposed grievance is based upon the idea that the decision conflicts with the paramount federal law, he may have his review upon writ of error from the supreme court to the state court, and perhaps in exceptional circumstances, through independent proceedings instituted in the lower federal courts.

"We make no suggestion as to the proper remedy in case of a result adverse to the railroad before the state court or upon this phase of the case, further than to say that the petitioner would be at liberty to renew his application in the federal courts without fear of being met by a plea of *res judicata*. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 230, 29 Sup. Ct. 68, 53 L. Ed. 150.

"In the *Smith* case, to which reference has been made (173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858), the defendant in error started the litigation in the state courts, and after the law had been sustained by the supreme court of Michigan

the railroad raised the question for the supreme court of the United States by writ of error, and that court passed upon the rights, not as rights involved in legislation in respect to matters about which the state legislature had the power to act, but as rights safeguarded by the federal constitution which were out of the sphere of legislative power and which were infringed by the statute upon its face. Reference is made to the character of the question in that case, to distinguish it from the questions involved in the case of *Bacon v. Rutland R. Co.*, 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538, upon which the petitioner in this case greatly relies. In the *Bacon* case, where the supreme court sustained the view of going forward in the federal courts under an independent bill, the questions involved, if we read the case correctly, were in a very substantial sense legislative questions, and the right to go forward at once in the federal courts was sustained upon the ground that the right of appeal from the Vermont public service commission in respect to these questions was not adequate, because the supreme court of Vermont has no legislative powers.

"The question before us being the concrete question whether the mileage-book statute is discriminatory upon its face, it is one to be controlled through judicial function, and as the right of appeal to the state supreme court given by the state statute requires that a rehearing by the commission must first be asked, and that the ground of appeal shall be stated, and the question having been limited to the single one which we have stated, we think the remedy through the statutory right of appeal is entirely adequate, and that all reasonable considerations of comity and of public policy require that the statute, against which objection was first raised before the New Hampshire tribunals, should first receive attention from the state courts. By such a course the petitioner loses no substantive right, because the law furnishes him a perfect safeguard through resort to the United States courts for review in respect to questions covered by the federal constitution.

"The question as to where a grievance of this kind should first be entertained is more a question of desirability, convenience, and comity than a question of right, and we are not disposed to follow the proposition of the right of way through priority of jurisdiction further than to cite a note, containing

authorities, which appears in 22 C. C. A. at page 358. It must be said, however, that aside from the force resulting from priority of jurisdiction is the further consideration that United States courts are reluctant to deal with state statutes with a view to sustaining or overthrowing them before the state courts have first had an opportunity to do that. The supreme court has repeatedly said that. It is said by Mr. Justice Hughes in *Louis. & Nash, R. R. Co. v. Garrett*, 231 U. S. 298, 305, 34 Sup. Ct. 48, 58 L. Ed. 229. It is said in effect by Mr. Justice Holmes in the *Prentis* case, 211 U. S. 230, 29 Sup. Ct. 67, 53 L. Ed. 150, in which both Chief Justice Fuller and Mr. Justice Harlan, though concurring in the result, dissent from the opinion because it does not go far enough on lines of comity. It has more recently been said in an opinion by Mr. Justice Holmes, handed down November 2, 1914, in *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. —. It is true that these cases have reference to statutes which it is claimed offend state constitutions, but it is not perceived that the reason of its being a state constitution instead of the federal constitution was the controlling reason. As has already been said, the federal constitution is a part of the system under which the state courts operate, and it is because the state courts recognize the federal system as a part of their own that rules of comity require, and particularly in cases first pending before them, that they should first have an opportunity to pass upon the statutes of their own state. It is incumbent upon the federal courts, in such a situation as this, to presume that, if the supreme court of the United States has declared a statute like the one involved here to be in contravention of the federal constitution, the supreme court of New Hampshire will give the force of such a decision its proper consideration and scope. Such a presumption results in a large measure because of the strong expressions by state courts like those of Mr. Justice Cullen in *Beardsley v. New York, L. E. & W. R. R. Co.*, 162 N. Y. 230, 56 L. Ed. 488, that 'in obedience to the law, as declared by the supreme court of the United States, we must hold the statute of 1895 is invalid,' that of the supreme court of appeals of Virginia in the *Coast Line Ry. Co.* case, 106 Va. 61, 67, 55 S. E. 572, 574 (7 L. R. A., n. s., 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124), that 'we are bound by this decision, as it emanates from the highest tribunal in the coun-



try, and numerous like expressions which could be cited, if deemed necessary.

"Holding this view as to where this statute should first receive consideration, there are two courses open—one, to deny the injunction and dismiss the bill, and leave the parties to resort, if necessary, to remedy through writ of error, or possibly through a new and independent proceeding in the district court; and, second, to hold the proceeding here, together with the application for an injunction, in abeyance, as was done by the supreme court in the Prentis case. There Mr. Justice Holmes said (211 U. S. 232, 29 Sup. Ct. 72, 53 L. Ed. 150) :

" 'As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them.'

"We are disposed to adopt the course suggested by Mr. Justice Holmes, and hold this proceeding in abeyance pending results in the state courts; and it is so ordered."

We call attention of the court to the similarity of the cases. The jurisdiction of the supreme court of Kansas in mandamus is constitutional. The case found its way into the supreme court in regular course of law by statutory and constitutional provisions provided by the legislature for the Commission to enforce its orders. The only difference between the proceedings had in the New Hampshire case and the present one is that the proceedings in the New Hampshire case were had by direct appeal from the commission's order, while here one of the cases considered in the proceedings, entitled *State, ex rel., v. Flannelly*, was begun by the Commission itself to enforce its order. It must not be forgotten, however, that the receivers filed an answer in that proceeding, praying for affirmative relief. They asked that the court determine they were not within the jurisdiction of the Commission because engaged in interstate commerce, as they do here, and that the opinion of the Commission, which was not then a completed order, because of the injunction issued by Judge Flannelly, intermediate the issuance of the Commission's opinion and the issuance of the order (rec. 117), be declared confiscatory. The judgment of the

court was that the order of the Commission was not completed, and that it would hold jurisdiction of the case until the Commission had made its final order, and would then determine whether it should be enforced. In other words, as is said by the court, speaking through Mr. Justice Porter, in the opinion, "the case was still open to both parties for any relief that might be asked after the order was completed by the Commission."

In the New Hampshire case the plaintiff railroad company neglected to take its appeal from the order of the commission refusing it a rehearing back to the supreme court. In the present case the receivers specifically and affirmatively refused the supreme court the possibility of passing upon the reasonableness of the order made by the Commission on its own petition for a rehearing.

The proceedings are essentially the same. The only possible difference is one of statutory machinery.

We call attention of the court also to the still later case of *Trenton and Mercer County Traction Corporation et al. v. The City of Trenton*, 227 Fed. 502. This was also a proceeding under the act of March 3, 1911, before Circuit Judge Woolley and District Judges Rellsbad and Haight. It was there determined that a federal court would not enjoin the enforcement of a state statute or the action of a board thereon, on account of alleged contracts as to rates, where a proceeding had been instituted before a public board and that board had a right to fix rates and enforce the same until the action so instituted before the board had been finally completed.

We insist that there is a want of equity where it is admitted, as it is in this case, that the affirmative action of the plaintiff in the suit deprived a court of law of jurisdiction, and where it must also be admitted that that court had concurrent jurisdiction with this one to determine the reasonableness of the order.

We repeat that the receivers had, and probably the surviving receiver still has, a right to appeal from the decision of the supreme court of Kansas on the question of interstate commerce to the supreme court of the United States, and that by asking for a ruling of the supreme court of the state on the reasonableness of this order, or of any order of which they complain, whether based upon the petition of April 9, 1915, or of December 28, an appeal could also have been had directly to the supreme court of the United States.

**THE RATES PROVIDED BY THE KANSAS COMMISSION  
DECEMBER 10, 1915, ATTACKED BY THE PLAINTIFF'S  
BILL WERE COMPENSATORY AND NOT SUBJECT TO THE  
PLAINTIFF'S CHARGE THAT THEY WERE CONFISCATORY  
OR UNCONSTITUTIONAL.**

Introducing the division of his opinion dealing with this question the trial court says:

"Passing to the merits. Thousands of pages of testimony and hundreds of exhibits have been introduced, covering almost every possible question that could arise in a rate controversy. Questions involved in the valuation of the plant; questions as to the character and extent of the business, including the available supply of gas, and the life of the gas fields; questions as to extensions; questions touching the cost of operation and maintenance; the rate of return proper to be allowed; and the amount of income necessary to meet requirements, have all been covered with great fullness and particularity, both in the evidence and in the arguments of counsel.

"It must be borne in mind, however, that this suit is not one for the fixing of a rate to be charged by the plaintiffs for natural gas, but it is a suit to determine whether the 28-cent rate already fixed by the Commission is confiscatory. Bearing this in mind, it becomes apparent that it is not necessary to discuss or determine many of the questions investigated before the Commission and upon which evidence and argument have been offered in this suit. It will not be necessary to determine whether the Commission adopted the best and most scientific method in fixing the 28-cent rate; if that rate is not confiscatory, the method by which it was determined is immaterial here. After determining the value of the plant for rate-making purposes the Commission allocated this value between the states of Missouri and Kansas on a certain percentage basis. The Commission also adopted a flat rate as distinguished from a distance rate, to cover a great many cities in Kansas. The Commission further divided the valuation of the property into two parts, one covering that portion used for production purposes, and the other that portion used for transportation purposes. Without passing specifically upon the conclusions of the Commission with respect to these several matters, it may be assumed for the purposes of the present discussion that

they were justified, but mention of certain matters in connection with some of them will be made later. It will be necessary, however, to consider briefly certain of the matters passed upon by the Commission in fixing the 28-cent rate."

Following this the trial court reaches the conclusion that \$7,000,000 is a fair value for the property at the time the suit was tried, which was somewhat less than the value fixed upon the property by the Commission. This, of course, did not include the valuation of the distributing properties and did include all of the transportation and producing property in the control of the receiver. The court agreed with the Commission in eliminating the element of going value, considered as a separate element of value, and in the separation of the producing and transportation properties. The Commission in treating this matter had eliminated any value for the remaining gas leaseholds, and in lieu thereof had given the company credit for all the gas produced at the price the Commission found the company had been compelled to pay for gas; that is, the producing property had been allowed to stand on its own basis and to pay the same return to the company that it would have made in the hands of third parties.

This narrows the controversy to the propositions of: (a) What should be allowed from annual revenue for annual depreciation of the property? (b) What should be allowed from annual revenue, if anything, for extensions? (c) The rate of return, the Commission fixing six percent as sufficient, although allowing much more than that; while the court finds that eight percent should be allowed on account of the hazardous nature of the business of producing, transporting and distributing gas.

The amount allowed for annual depreciation and for extensions is dependent to a large extent upon the life of the field, from the viewpoint of the trial court, and we think this will prove to be one, if not the principal turning point in the case. Therefore, we have conceived that the differences between the trial court and the Commission, and hence the validity of the so-called 28-cent order of the Commission, may be analyzed as in our statement of claims (brief, 117), which for the convenience of the court we now repeat:

(a) That the rates in effect under the rate order of the Commission of December 10, 1915, were higher than those provided for in the franchises under which the Gas Company began

business, except in the city of Topeka, and produced a larger income on the system as a whole, including Topeka, than would the franchise rates. That company could not, therefore, complain in equity that such rates were confiscatory or unreasonable. (Assignment of Error XI, Rec. 607.)

(b) That allowances for betterments or extensions of the pipe lines of the company should not have been charged to maintenance or allowed for in the usual annual operating expenses of the receiver. (Assignment of Error IX, Rec. 607.)

(c) That the findings as to the life of the property should not have been based upon the probable life of the gas field in Kansas or Oklahoma. (Assignment of Error VIII, Rec. 606.)

(d) That the findings of the Commission as to the price of gas purchased in Oklahoma by the receiver and the rate of income to which he was fairly entitled on the property employed in the business by him were supported by the evidence, and the conclusions of the district court thereon are erroneous. (Assignment of Error VII, Rec. 606; Assignment of Error XI, Rec. 607.)

We have already discussed the proposition that the rates as a whole were put into effect voluntarily by the company.

In all of the discussions of the sufficiency of the 28-cent rate, Table No. 5, prepared and presented in the opinion of the Commission, seems to have been the pivot upon which were hinged all the differences of opinion, and as the starting point, for the convenience of the court, we again reproduce this table:

TABLE NO. 5. KANSAS NATURAL GAS COMPANY.

STATEMENT of Estimated Revenue and Requirements for the Ensuing Year Based on 1914 Figures, Revised as Previously Explained, for the State of Kansas.

<i>Requirements.</i>	<i>Transportation.</i>	<i>Kansas.</i>
25,671,445 M. cubic feet gas at 4c.....	\$1,026,857.80	\$514,045.01
Operating expenses and taxes assigned to transportation..	510,536.14	223,245.11
Receivership expenses .....	32,228.00	14,093.30
Uncollectible gas accounts.....	12,555.07	6,359.14
Taxes, Kansas City Pipe Line.....	32,288.27	16,860.51
Taxes, Marnet Mining Company.....	10,497.35	5,916.91
Maintaining organization, Marnet Mining Company.....	690.20	349.59
Total .....	\$1,626,652.83	\$780,269.57
* Present value of transportation property, \$7,083,605.64; depreciation on basis of twelve years.....	590,300.00	268,468.44
Requirement, exclusive of a return on property investment.	\$2,216,952.83	\$1,048,738.01
° Return on present value..... \$7,083,605.64		
Add for working capital..... 200,000.00		
Total .....	\$7,283,605.64 at 6%.	\$437,016.35
		\$198,755.00
		\$2,653,969.18
		\$1,247,493.01

\* The division of these items between Kansas and Missouri has been made on the basis of the use of the property as shown in Table 1.

*Estimated Revenue.*

Gas sales, 1914.....	\$1,192,089.82
† Gas used in compressor stations (on basis of use).....	31,737.70
Total .....	\$1,223,827.52
Estimated revenue from proposed increased rates.....	171,513.63
Total estimated revenue from Kansas.....	\$1,395,341.15
Deduct requirements as above.....	1,048,738.01
Estimated net revenue.....	\$346,603.14
Which is equal to a return of 10.46% on the present value, \$3,312,583.83, which is 45.48% to Kansas of the total of \$7,283,605.64, or—	
Total estimated revenue for Kansas.....	\$1,395,341.15
Less requirements, including a 6% return.....	1,247,493.01
Surplus .....	147,848.14

- (a) The rates in effect under the rate order of the Commission of December 10, 1915, were higher than those provided for in the franchises under which the Gas Company began business, except in the city of Topeka, and produced a larger income on the system as a whole, including Topeka, than would the franchise rates. That the company could not, therefore, complain in equity that such rates were confiscatory or unreasonable. (Assignment of Error XI, Rec. 607.)

The so-called 28-cent order of the Commission fixed 28 cents as the rate in all cities except in Montgomery county and those supplied by the Gunn Pipe Line, where, on this pipe line, the rate was allowed to remain at 30 cents. In Montgomery county the rates were raised from 20 cents to 23 cents, except at Elk City, where the former rate of 25 cents was allowed to remain. The rate for boiler gas and other industrial purposes was 10 cents per thousand feet in Montgomery county and 12½ cents in all other Kansas territory. As stated in the heading, this rate produced a larger amount of revenue than the franchise rates would have produced—rates under which the company began business. We call the attention of the court to exhibit B of plaintiff's bill, which sets out a synopsis of the franchise rates agreed to by the company at the beginning of business. (Rec. 47, 48, 49.)

## EXHIBIT B.

*Rates Provided by Franchises in Principal Cities Supplied by Kansas Natural Gas Company and Rates in Effect Prior to December 10, 1915.*

† This item is placed here to balance an equal sum included in the expenditures. It is a bookkeeping entry solely.

Kansas City, Missouri, franchise No. 33887, dated September 27, 1906, provides for the following rates:

- 25 cents from December 1, 1906, to December 1, 1911.
- 27 cents from December 1, 1911, to December 1, 1916.
- 30 cents from December 1, 1916, to October 1, 1936.

With the privilege of adding a penalty of 10 percent to delinquent bills, and of making a minimum charge when amount consumed is less than 50 cents.

The 27-cent rate has been in effect since December 1, 1911.

Kansas City, Kansas, franchise No. 6051, dated December 14, 1904, provides for the following rates:

- 25 cents from October 1, 1905, to October 1, 1907.
- 28 cents from October 1, 1907, to October 1, 1908.
- 29 cents from October 1, 1908, to October 1, 1909.
- 30 cents from October 1, 1909, to October 1, 1910.
- 35 cents from October 1, 1910, to October 1, 1925.

With the privilege of adding a penalty of 2 cents per 1,000 cubic feet to delinquent bills, and of making a minimum charge when amount consumed is less than 50 cents.

This franchise also contains a provision that the rates shall not be higher at any time than the rates in Kansas City, Missouri.

The 25-cent rate is still in effect in Kansas City, Kansas.

Leavenworth, Kansas, agreement of May 16, 1905, provides for the following rates:

- 25 cents from January 1, 1906, to January 1, 1908.
- 30 cents from January 1, 1908, to January 1, 1911.
- 35 cents from January 1, 1911, to January 1, 1926.

Letter of October 10, 1907, provides that they may sell gas at the rates prevailing in Kansas City, Missouri.

The 25-cent rate is still in effect in Leavenworth.

Atchison, Kansas, franchise No. 2527, dated June 10, 1905, provides for the following rates:

- 30 cents from April 1, 1906, to April 1, 1911.
- 35 cents from April 1, 1911, to April 1, 1936.

With privilege of adding 10 percent to delinquent bills, and of making a minimum charge when amount consumed is less than 50 cents.

The agreement of July 12, 1905, provides that gas shall not be sold at any time at rates higher than in Leavenworth, Kansas, and St. Joseph, Missouri.

The 25-cent rate is still in effect in Atchison.

Tonganoxie, Kansas, agreement of November 2, 1905, provides for the following rates:

- 25 cents from November 1, 1905, to November 1, 1907.
- 40 cents from November 1, 1907, to November 1, 1925.

With privilege of adding 10 percent to delinquent bills.

The 25-cent rate is still in effect in Tonganoxie.



Lawrence, Kansas, ordinance No. 95, approved April 8, 1904, provides for the following rates:

- 25 cents from October 16, 1905, to October 16, 1907.
- 30 cents from October 16, 1907, to October 16, 1905.

With privilege of charging a penalty of 3 cents per thousand on delinquent bills.

The 25-cent rate still in effect in Lawrence.

Topeka, Kansas, agreement of January 5, 1905, provides for the following rates:

- 25 cents from December 1, 1905, to December 1, 1907.
- 30 cents from December 1, 1907, to December 1, 1910.
- 35 cents from December 1, 1910, to December 1, 1925.

With privilege of charging a penalty of 3 cents per thousand on delinquent bills.

The 25-cent rate still in effect in Topeka.

Ottawa, Kansas, agreement of September 30, 1905, provides for the following rates:

- 25 cents from December 1, 1905, to December 1, 1910.
- 30 cents from December 1, 1910, to December 1, 1925.

Ten percent penalty allowed on delinquent bills, and may make minimum charge when bills are less than 50 cents.

The 25-cent rate still in effect in Ottawa.

Baldwin, Kansas, agreement of July 10, 1905, provides for the following rates:

- 25 cents from October 1, 1905, to October 1, 1907.
- 30 cents from October 1, 1907, to October 1, 1925.

Ten percent penalty allowed on delinquent bills.

The 25-cent rate still in effect at Baldwin.

The foregoing are the principal towns on our northern system, with the exception of St. Joseph, Missouri. All of the smaller towns which we supply through the Union Gas and Traction Company (Gunn Pipe Line), have franchises which provided for a rate of 25 cents net for the first two years after the gas is turned into the lines, and thereafter 30 cents net, with the privilege of adding a penalty of 10 percent on delinquent bills.

#### CONTRACT RATES NOT CONFISCATORY.

Rates which are higher than the contract rates agreed upon by the parties, or which are the result of contracts, cannot be confiscatory. They are in effect voluntary rates, as they result from the voluntary acts of the parties.

Referring to Exhibit B, bill of complaint, given above, we discover that the 28-cent order allowed one cent per thousand feet more in Kansas City, Kan., than could have been collected under the contract entered into between the Kansas Natural

and the cities at the time the natural-gas business was begun in that city.

If the contracts had been observed the rates at Atchison and Leavenworth would have also been one cent higher under the 28-cent rate than under the contract rate, for in those cities, as in Kansas City and Rosedale, the rate was not to be higher at any time than the rates in Kansas City, Mo.

Topeka, therefore, is the only first-class city where the 28-cent rate did not permit a higher rate than the contract rates at the time the order was made. The amount of gas consumed in these first-class cities, excluding Topeka, was approximately two billion feet, and under the 28-cent rate the receiver collected \$20,000 more than he could have collected under his contracts had they been allowed to remain in force.

But this is not all of the story. The supreme court of the United States, in the case of the *Wyandotte County Gas Company v. City of Kansas City*, 231 U. S. 622, held that the contracts in cities of the second class were binding as to rates. In Lawrence and Ottawa, the principal second-class cities, the company was entitled to 30 cents after 1907. In Exhibit B the complainant makes the following statement:

"All of the smaller towns which were supplied through the Union Gas and Traction Company have franchises which provide for a rate of 25 cents net for the first two years after the gas is turned into the lines, and thereafter 30 cents net."

So that it may be said, speaking generally, that in the cities of the second class under the terms of the contract the receiver was entitled to 30 cents. No application was made to the Commission to put into effect the contract rates, and if these rates are binding, as the supreme court of the United States says, the receiver ought not to be heard to complain of them in equity, or in this kind of a suit. There is nothing to prevent the parties agreeing to a different rate.

The complainant himself thus repudiated his contract rates and sought to establish higher ones. In no sense, then, has he ever attempted to enforce the contract rates in the cities of the second class. The record discloses the contract rates at Fort Scott and other cities supplied by the Gunn Pipe Line, and the 28-cent order permitted an advance to 30 cents in those cities.

Upon the whole, then, we have this situation: That on a property which it is insisted by the plaintiff shall be considered a unit, and operated as a unit, 60 percent of the gas supplied is used in Missouri, where the defendant Commission has no control at all of the rates. As to the supply in Kansas, 45 percent of the product is used in Montgomery county, either for boiler gas or at a rate three cents less than allowed by the Commission for domestic use. In Kansas City, Kar., Leavenworth and Atchison the rate allowed by the Commission is at least one cent higher than the contract rates. This covers at least one-fifth of the Kansas product, and, added to the 45 percent consumed in Montgomery county, leaves only 35 percent which could be sold at less under the 28-cent order than at the contract rates of the plaintiff.

On the Gunn Pipe Line the rates are the contract rates. In cities of the second class the rate allowed by the Commission is only two cents under the contract rates, and the receiver has made no effort to enforce the contract rates. If these rates are valid he has no cause to complain in this suit. This leaves the city of Topeka alone where the receiver can justly claim that he is receiving a less rate under the 28-cent order than he had, either by contract or otherwise, voluntarily put into effect. Against his possible loss in the city of Topeka is to be balanced an advance of three cents per thousand feet on domestic gas in Montgomery county, and one cent in the cities of Kansas City, Atchison and Leavenworth, and the abrogation of the free gas contracts in all of the cities. The abrogation of this clause did not disturb the validity of the contracts in the least, for by the public utilities act the Commission was authorized to act in place of the cities, and the receiver as well as the Kansas Natural Gas Company consented to and was benefited by the change.

Finally it comes to this, that the controversy between the receiver and the Commission is in reality over only the gas delivered in Topeka, or less than 10 percent of what is consumed in the state of Kansas, while the receiver is charging three cents less on 45 percent of the Kansas product than he was authorized to charge under the Commission's order.

If contract rates cannot be attacked as noncompensatory *a fortiori*, higher rates which are granted through the gener-

osity of the state cannot be attacked in equity as noncompensatory.

We have already discussed in the division of this brief on interstate commerce the validity of these franchise contracts and the source of their origin and authority. It will not be necessary to repeat the authorities there given.

In the state of Kansas gas distributing plants could, in 1905, be constructed in cities of the first class only by authority of such cities "under such restrictions as shall protect public and private property and insure proper remunerations for such grants." (Chap. 122, Session Laws 1903, sec. 54. See, also, sec. 51.)

"In cities of the second and third class such consent was not necessary (sec. 1366 of the General Statutes of 1901), but the grant of a franchise by a city even under such circumstances is a sufficient consideration for agreement by the company to whom the grant is made when contained in the franchise." *City of Emporia v. Telephone Co.*, 88 Kan. 443.

Under section 2 of chapter 136 of the Laws of 1903, which were the laws in effect at the time of the granting of these franchises, cities of the second and third class were authorized to make a binding contract with gas companies for the supply of gas to the cities concerned and to fix the rates by contract for a period of twenty years. See *State v. Gas Co.*, 88 Kan. 174, and the same case on appeal, 231 U. S. 622.

There are two quite radically different kinds of contracts which cities may make with public utilities represented by these two classes of cities, cities of the first class falling within one class and cities of the second and third in the other. By one kind of contract there is a mutual stipulation as to rates, and this applies to the latter class given above. The city, by virtue of expressly delegated authority, suspends the general legislative power of the state. It makes an agreement binding upon the state as to rates in favor of the public utility. In the first kind of contract, however, the agreement of the city contains no promise on its part concerning rates. The only thing the city agrees to do is to give to the utility the use of its streets and other local and public benefits flowing naturally from the use and exercise of the franchise. In consideration of the use of the streets and these other benefits the public utility, upon its part, agrees not to charge more than certain stipulated rates.

The power to make this kind of a contract in no way depends upon the authority of the city to waive or suspend the sovereign power of the state in the regulation of rates. See Dillon, 5th edition, *Municipal Corporations*, par. 1326, and numerous authorities there cited.

But we assert that when contracts, through the concession of the city or other state agency—in this case the Public Utilities Commission—representing the cities, grants the utility a rate equal to or greater than the franchise rate, it is estopped to plead the confiscatory character of such rates. *Whether it shall collect three cents more in Montgomery county or two cents less in cities of the second class is an administrative order of the Commission and cannot be interfered with by the courts unless it be shown conclusively that that particular provision of the rate order results in confiscation or in the utility receiving less than it would receive had the franchise rates been strictly adhered to.*

See *Grand Rapids and Indiana Ry. Co. v. Chas. S. Osborn*, 193 U. S. 17, referred to in a previous section of this brief. See, also, *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79:

"A street railway company whose charter subjects it to 'all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force, relating to street railway companies,' is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations."

From the opinion of the court, *l. c.* 84: "By the latter act the plaintiff in error was 'subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force, relating to street railway companies. There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. Laws, chap. 112, sec. 72, Stat. 1900, chap. 197, if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability, and could not be heard to complain. *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Ashley v. Ryan*, 153 U. S.

436, 443, 38 L. Ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Wight v. Davidson*, 181 U. S. 371, 377, 45 L. Ed. 900, 903, 21 Sup. Ct. Rep. 616; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579, 48 L. Ed. 795, 800, 24 Sup. Ct. Rep. 553."

See, also, *Knoxville Water Co. v. Knoxville*, 189 U. S. 434.

The law relative to contract rates, the authority of cities and utility corporations to enter upon such contracts fixing rates, the effect of a subsequent enactment of a public utility commission law, and the right of that commission to revoke rates fixed by contract, has been very learnedly considered and fortunately stated in a late decision by the supreme court of the state of Washington, *State v. Home Telephone and Telegraph Co.*, 172 Pac. 899. The court said in part:

"Thus the law is settled that the city of Spokane had the authority to fix in the appellant's franchise the telephone rates to be charged. If it is true that the city had the right to withhold its consent before a telephone company would be allowed to use its streets, and to impose as a condition of granting its consent to the maintenance of certain rates to be charged to users of the telephone service, the telephone company accepting such franchise is, as long as it operates thereunder, bound by its terms, unless relieved therefrom by the public service commission law. And it matters not what nomenclature may be used to describe the obligation of the franchise holder; whether it be called a condition, a contract, or as, in *State, ex rel. Webster, v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287 Ann. Cas. 1913D, 78, a grant, license, or reservation. For, as said in that case, 'the power to fix and determine rates being within the police power, the city might establish rates, but that it could not, under the delegation quoted, contract so as to bind itself or the other party as against the exercise of the police power,' which merely means that the rate established in the franchise is binding until the sovereign police power cuts the bond. A franchise obligation is no less a contract because it may ultimately be abrogated by the state in the exercise of its police power than was the obligation set aside in the case of *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, not a contract because revocable. No one would suggest that until the pub-

lic service commission interfered the relation between the two parties to that suit had not been that of two parties to a contract."

It seems to follow clearly from this case and the authorities cited to support the opinion of the Washington supreme court, that the power of the Commission over rates in the instant case was wholly that of revocation of an existing contract rate. This was true as to cities of the first class as well as cities of all other classes. Hence it is beyond all dispute that the action attempted to be taken by the Commission was legislative and administrative and cannot be reversed, in equity, by the court on the ground of unreasonableness. If it be said that the action of the Commission in allowing the contract to be modified amounts to a complete revocation of the contract, the answer is that in order to effect such revocation there must at least be an agreement between both parties to the contract to revoke it and substitute a new contract in its place.

The Kansas Natural Gas Company was therefore bound to furnish the service at the contract rates and apply to the Commission for relief from these rates. The Commission, for example, proposed that 28 cents be substituted for the franchise rates, but the gas company, through its receiver, refuses to accept the proposition. This does not revoke the contract—it leaves the parties where they were before the application was made. The courts cannot compel the Commission to consent to the modification of a legal contract. In doing so, or refusing to do so, the Commission is acting under its governmental power, and the fact that the basis of the rates established in the franchise rested upon contract prevents a court of equity from saying that such rates are, or can be, confiscatory, illegal or unreasonable.

- (b) That allowances for betterments or extensions of the pipe lines of the company should not have been charged to maintenance or allowed for in the usual annual operating expenses of the receiver.**

We regard this point as crucial on the question of the adequacy of the 28-cent rate; that is, if we put out of view the binding force of the franchise rates discussed by us in the former part of this brief. It was the duty of the Kansas Natural Gas Company, as well as of every other utility, to



provide the capital with which to perform the service called for in its franchise. It seems intolerable that it should be allowed to collect money from the public and reinvest it in its plant and then proceed to amortize the investment by an annual charge, in this case one fixed by mere conjecture, as to the probable life of the property, and in addition thereto demand that the public pay a return upon the amount invested; that is to say, the public is required to pay a return upon the property provided for by the public and invested by it. We assert that such a rule is not only illegal and inequitable, but that its application will destroy every element of reasonableness, so far as the public is concerned, and in most cases wreck the utility property itself because of the inability of the patrons to pay the rates made necessary by such a rule.

At every stage of this proceeding we have challenged counsel to produce an authority of court or commission which approved the charging of extensions or betterments to maintenance, as distinguished from capital account. No such authorities have been produced, and the trial court in its opinion produces none, as will be noted hereafter. This method of providing for betterments and extensions is as unusual as it is unauthorized. The very officers of the company themselves testified that such a procedure was unheard of.

Mr. Hays testified before the Commission that the usual way was to make such extensions and charge the same to capital account. (Rec. 1100.)

Mr. Bartlett testified that the usual way of treating extensions was to charge them to capital account. Mr. Doherty testified that the proper and regular way was to charge such expenditures to capital account, but stated that this is an extraordinary situation, that the plaintiff must be assured of a return before the extensions are made. Plaintiff has not cited a single instance where such substantial additions have been made to the property and charged to operating expense. We have not been able to find a single case before any Commission nor in any court where it is held that such additions to the property of the company are a proper operating expense or maintenance charge, but are in fact held to be additions to property, and properly added to capital account.

It may be possible that the Commission would have the

authority to fix a rate which the plaintiff would think would warrant him in making the extensions in the regular way, but if it did so it would depart from the usual and customary way of fixing rates. The Kansas Commission has no legal authority to compel the plaintiff to extend his pipe lines even if it should make such an allowance in the rate. The Commission in 1913 ordered the Kansas Natural to make the extensions to get the gas, and the federal court promptly held that inasmuch as the extensions were to be made in Oklahoma the Commission was powerless to make such an order, and promptly set it aside, so that the Commission was in the further embarrassing position of being asked to fix a rate which would yield what the plaintiff thought to be an adequate return upon an investment which it was powerless to compel the plaintiff to make. Whatever discretion the Commission may have in this respect, the plaintiff has no legal right to demand it. It is the legal duty of the plaintiff to make all necessary expenditures and extensions to furnish the service, and when he has furnished the service it is then the duty of the Commission to fix the rate that will yield an adequate return upon the property used and useful, and the court can give no more to the plaintiff than his legal right; and these defendants contend that the court has no legal right to set aside a rate fixed by a Commission for a utility that confesses to the court that it is not, and will not, furnish the services unless a rate suitable to it is fixed. It is the plain duty of the plaintiff to make such additions and betterments to his plant as are necessary to adequately serve his customers, and he has no standing in a court of equity to complain of the rates fixed for that service until he does.

The only attempted justification of appellees on this position is based on the cry of "hazardous business." In fact, "hazardous business" has proved very expensive to the public in the consideration of this gas case, as the public has borne it at every turn of the calculations. "Hazardous business" was taken care of by fixing the life of the property, and it would seem that that should take all the hazard out of the proposition, for the court fixed the life of the property at a time when it would be certain that the depreciation would return the entire property to the investors, dollar for dollar.

Again, on the amount of interest, 8 percent is allowed instead of 6, on the ground of "hazardous business"; and finally, for the third and last time, the receiver and property owners of the Kansas Natural are permitted to charge approximately \$250,000 per year to maintenance, which is put back into their property in permanent improvements in the name of this same "hazardous business." Truly, it is "hazardous" to the public. The Commission, considering the nature of the business, allowed the enormous depreciation of \$590,000 per year. The court doubled it, permitting the unheard-of depreciation of \$1,080,000 on a property which had already been depreciated out of earnings down to the figure of \$3,005,000, with an admitted salvage of over \$250,000 remaining. The salvage and the depreciation for three years would replace the property and leave the owners \$485,000 to give to the church, donate to the poor, or put in their own pockets, which it is fair to assume they would do.

Was it fair and equitable that in addition to this the cost of these extensions should be amortized over the same period against the consumers without even an allowance for an added salvage value at the end of the six years? The physical value of the extensions at that time would be almost as much as when new. It was suggested by the court in the trial of the cause that when extensions became necessary at a period of time so near the close of business, for example, in the last year of the allotted life of the physical property, that there was no difference between maintenance and capital account. We think the court is in error in this assumption. Capital should never be charged to maintenance. If it became necessary in the operation of a railroad to replace a bridge or other permanent structure within the last year of the estimated life of the property the betterment should be made from accumulated depreciation or the fund provided for that purpose. The capital account would thus be increased and the salvage of the property to be returned at the end of the year to capital account increased in the same sum. So, in fixing the period of five or six years for the remaining life of the property, which we think we have also shown was an error on the part of the court, the betterments should have been made from the depreciation account, and then a return allowed upon the investment when made. The court by allowing these extensions assumes

that they were made at the time of the hearing and proceeds to depreciate them along with the other capital account and physical property of the gas company. This was not only incorrect as a matter of bookkeeping, but assumed something would be done which might never be done, or if done, might add nothing to the value of the service to the consumer. If the life of the property was to be measured upon the life of the field, and depreciated accordingly, as is done by the court, for the six years immediately succeeding the hearing, it should have been done in the same way from the beginning of the property, and the life of the property as a whole from the first considered to be fourteen years. If this had been done the present value of the property would have been considerably reduced and the consumer would have had some benefit of the proposition that the enterprise was "hazardous" or a mining proposition. This was done in the case of the *Goldfield Consol. Water Co.*, 236 Fed. 979, where, in the consideration of this question, the court said:

"The life of Goldfield, as of every mining camp, is uncertain; sooner or later the ore deposits will be exhausted, and the mines abandoned. Complainant avers that when this occurs at the expiration of eight or nine years, its property will have no value. The bulk of this depreciation will have been caused, not by age, use, or action of the elements, but by the failure of the mines; there will be no market in Goldfield for complainant's water, or any considerable demand for its services. If depreciation of this character must be provided for in the rates, as complainant demands, it is no more than just that it should be considered in determining the present reasonable value of the property."

We do not think the receiver should be allowed to eat his cake and have it too. If the company did not provide for depreciation when the rates were voluntary it is not the fault of the public, and it cannot now be charged with that increased depreciation. Calling the attention of the court to the law of allowing betterments to be made out of maintenance or operation costs, no clearer case can be found than that of the *Advance in Rates, Eastern Case*, 20 I. C. C. R-243, 265, 1 Whitten on Valuation, sec. 204. The carriers in those cases contended for the very principle for which the receiver contends in this,

and which was apparently allowed by the court in the temporary injunction opinion. The Interstate Commerce Commission, reviewing the case of *Central Yellow Pine Association*, 10 I. C. C. R.-505, and *Illinois Central R. R. Co. v. I. C. C.*, 206 U. S. 441, said:

"In examining this matter the Commission found that the carriers had charged as a part of their operating expense large sums which had, in fact, been devoted to the purchase of new equipment, to the making of new equipments to their roadway and structures, and held that these items were not properly chargeable as operating expenses, for the reason that the shipper of to-day could not be properly required to pay the entire cost of an improvement or addition which was to be of permanent use."

Again, the Commission said:

"It is evident that until the status of this surplus is determined by legislative action or judicial interpretation this Commission cannot properly permit an advance in rates with the intent to produce an accumulation of surplus for this purpose."

In the *Illinois Central* case, *supra*, the supreme court on this question, said:

"It would seem as if expenditures for additions to construction and equipment, and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year."

Again, distinguishing the case of *Union Pacific R. R. Co. v. United States*, 99 U. S. 402:

"But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

**Life of plant not to be depreciated on basis of life of business.**

It is clear from these authorities that the method used by the trial court in charging to the patrons the immediate expense of extensions is not the legal or ordinary one. The answer of the court, already suggested, that the error is immaterial if the cost of the improvement is to be amortized against the consumer during the remaining life of the property involves another fundamental error, that of fixing the life of the property by conjecture—that of making the life of the property coexistent with the result of guessing at the life of the gas field.

In other words, the consumer buys the old plant, or returns its value to the company, and buys another new one in part and adds to his own distress by increasing the amount necessary for amortization of the improved plant. Is not this exactly what the court does when he makes the consumer pay for extensions less the scrap value of the end of an imaginary life of the gas field—in this case only five years? The company is amply compensated for its "hazardous business" when the public is charged the current price for gas in the field or delivered at its trunk line, and again, in higher return than is accorded to other utilities. Why should the consumer for any one year pay more for extensions than a fair return on the amount invested and a depreciation charge sufficient to amortize that value during the *physical life* of the property? The public is not interested in mining—it has not embarked in the venture, and should not voluntarily be charged with that risk.

The public does not, under the law, underwrite the utility's business or guarantee the unfailing source of its supply. The public's obligation is not to take the utility's property without compensation. It does not take what it left when the utility quits business—it should pay the difference between the value put in and the junk value. This is a very simple proposition where the property is purely a purchase and transportation one, and the physical value of the property has a well established percentage or basis of depreciation in use. This was found by the Commission on evidence furnished by the receiver himself at twenty years, based on this percentage of depreciation.

It is a self-evident proposition that it is the same thing to charge the consumer with one-fifth of the cost of an extension each year that it is to put in the extension and depreciate it as

to the extent of its full value in five years. But this does not prove the correctness of the principle involved. It amounts to allowing the company to construct improvements out of surplus and then not only receive income on surplus, but amortize the surplus at the same time.

We insist that amortization for the purpose of returning the investment to the utility owned should be based upon physical value and the probable life of the plant used for the purposes for which it was designed. We insist that obsolescence, or the displacement of property because of inventions or changes in the general science of the business, is a different proposition from applying the same doctrine where the source of supply of the utility fails, or where the person constructing the utility has made a bad business venture and asks the public to take the burden off his shoulders by underwriting the proposition. The right of the utility owner to receive back the capital invested means nothing more than his right to receive the physical property depreciated by the use which the public has made of it, and it should never include the speculative value of a mining proposition such as gas or oil fields. This the court itself finds is unknowable and can only be the result of conjecture, if included within the value which is to be amortized by the application of returns from the property.

Of course it will be noticed that requiring the amortization of the property within a certain assumed time amounts to the same thing as selling the property to the consumer and compelling him to pay for it as an entirety during the assumed life of the plant. The enlarged court found as to the life of the property as follows:

"The life of the company as a going concern is necessarily unknown and unknowable, a matter of opinion, and yet the court must determine what it probably is, and a consideration of the evidence and the history of the gas fields in Kansas and Oklahoma, and the testimony of witnesses familiar with that history, with the fields and with production, purchase, transportation and sale of gas, has brought the minds of all the members of the court to the conclusion that the probable life of the Natural Gas Company as a going concern is approximately six years from this date, June 3, 1916."



It surely will be conceded that equitable remedies should not be based upon mere conjecture or opinion. If the case of complainant is not susceptible of any other proof than conjecture, it is his misfortune and not the misfortune of the defendants or of the public, and it is intolerable that a court of equity should be employed for the purpose of compelling the public to stand and deliver at the demands of someone who has undertaken an impossible and improbable business transaction. Why should such an investor be put so much above his patrons in the consideration of rates?

Whatever a Commission or legislative body might do in the premises is one thing, but certainly a court of equity can not, under the guise of determining the reasonableness of a rate or its compensatory character, act at all unless compelled to do so by the clearest and most satisfactory evidence. On the proposition of the use of surplus for investment in betterments and payment of returns thereon we call attention of the court to the review of that subject by Mr. Whitten in his work on Valuation, sec. 204, where he says:

"In certain cases it has been asserted that the public utility should, in addition to a fair rate of return, be allowed to accumulate sufficient surplus earnings to construct needed betterments. This is primarily a question of rate of return and not of valuation, but it necessarily leads to the question of whether if this is done the investors are entitled to a return on the value of betterments thus constructed. This would be clearly absurd."

Then follows a review of the holdings of the Interstate Commerce Commission and the supreme court of the United States in cases already cited. Mr. Whitten also quotes from the opinion *In re Queensborough Gas and Electric Company*, 2 P. S. C., 1st D. (N. Y.), in which the opinion of the Commission was written by Commissioner Maltbie, as follows:

"Furthermore, it is not reasonable to require consumers to pay higher rates than they otherwise would be required to pay in order that these higher rates may provide funds from which to construct additional plant, which becomes the property of the company. Such plant and property is ordinarily paid for out of capital, but whether this course is followed, or the stockholders voluntarily relinquish a share of their dividends in

order to increase the value of their property, has no relation to this case. Suffice it to say that the consumer should not be required to pay higher rates and thereby make a donation to the company or to its stockholders."

The case of *Fall River Gas Works v. Board of Gas and Electric Light Commissioners*, 214 Mass. 529, was a case where the court reviewed the action of the state board in refusing permission to the company to issue additional stock for betterments or extensions. The action of the board was reversed, the court saying, in part:

"It is the duty of the public service corporation to have its plant large enough to perform the service for which it was established, and it has a corresponding right to have such plant fairly capitalized. It is its duty to keep up the plant, whether by repairs or otherwise, out of its earnings, and this duty is superior to its right to distribute its earnings in dividends. If the time comes when the plant of the corporation is insufficient for the performance of its corporate duties to the public, then it is subject to the same duty and is invested with the same right with reference to the additional plant as in the case of the original plant—the duty to increase the plant and the right to capitalize fairly the value of that increase."

The effect of this holding was that the company could not be compelled to apply surplus earnings to betterments, and, indeed, that such action of the company would be illegal, for it would mean the collection of larger amounts from the public than would be necessary to pay a reasonable return upon the property.

We quote also section 401 from Mr. Whitten, entitled, "Uniform Investment Cost Method of Adjusting Depreciation":

"In even closer conformity to the theory of rate regulation, depreciation may be treated as the adjustment necessary to secure a uniform annual investment cost. By this is meant that the annual charge for interest and profits and for the repairs, renewals and replacements necessary to keep the property in good working order shall be uniform. It is of course much easier to state this principle than to apply it. It seems, upon the whole, the most plausible theory, yet only fragmentary suggestions can be offered as to its application. It will make use in part of the straight-line method and in part of the sinking-

fund method, and will add to these the additional factor of a direct amortization of capital.

"The determination of annual depreciation requirements is largely a matter of cost accounting. The supply of a public service must be considered a continuous process. The problem is to so arrange the depreciation allowance that the investment will be carried and kept intact at a uniform annual cost. The annual investment cost includes not only interest and profits, but also the repairs, renewals and replacements necessary to keep the property permanently in good working condition. If this allowance is adequate, the rights of the investor are safeguarded. If this allowance is determined in the most economical way, the rights of the consumer are safeguarded. A fact of prime importance in the consideration of this question in connection with a public utility is that the real permanent investment must be something less than the cost new. After a start with all new structures and equipment there will never be a return to this condition except in the case of extraordinary total supersession. Total plant supersession should be treated as a hazard rather than a cost (see sec. 452). As the permanent investment must be less than the original investment, it is possible to reduce the permanent annual charge for interest and profits by amortizing a part of the original investment. It is possible to do this with justice to the consumers of the earlier period, because in that period the expenditures for repairs, renewals and replacements are less than will be the later permanent average expenditures for this purpose. Moreover, in view of the fact that such expenditures are ultimately *permanently* greater than during the first period, there must be some *permanent* reduction in the annual charge for interest and profits, as otherwise the total annual investment cost will not be uniform, but will increase. Other conditions remaining the same, this will require an increase in the rates of charge. This would be unfair to the consumers of this period, as they are equitably entitled to the same investment cost and the same relative rate of charge as the consumers of the earlier period.

.....

"Under the uniform annual investment cost method the existing depreciation is the amount of the original investment that has been amortized as a necessary result of the actual or theoretical application of this method from the initiation of the enterprise."

Section 452, referred to in the above text, is as follows:

*"Extraordinary functional depreciation.* But there may be extraordinary supersession for which in particular cases there may have been no opportunity to provide by means of an accumulated reserve. A new invention may so revolutionize methods of production as to require the scrapping of practically the entire plant. This is a possibility that, while recognized, is not provided for by means of a reserve for the amortization of existing capital. The difficulty is that this complete plant supersession may come in five years or in fifty years, or perchance not at all. There is no more telling when it will come than when fire will destroy a particular building. The hazard of complete supersession is greater for some enterprises than for others, just as the fire hazard is greater for some buildings than for others. It is as difficult for a public utility plant to provide against this sort of supersession as it would be for the owner of a single building to carry his own insurance. There are no supersession insurance companies, and there is no probability that they will or could be developed. However, if there were such companies the annual premiums for supersession insurance could be charged to operating expense in the same way that fire insurance premiums are now charged. This would take care of the supersession hazard. As it cannot be thus shifted, it must be borne directly either by the investor or by the consumer. Ultimately, in any case, it must be borne by the consumer, as the investor will not assume the risk unless he has a consideration in the shape of the possibility of higher rate of return.

"In manufacturing and other competitive enterprises it is the investor that assumes the supersession hazard, and he accordingly obtains a higher normal rate of profit than would prevail were it not for this hazard. The consumer, of course, in the long run, pays for all supersession, as it is a necessary part of the cost of manufacture or service. *Unless a different arrangement has been agreed upon in advance, it is natural to assume that the investor in a public utility plant has assumed the supersession hazard, and is entitled to a correspondingly higher rate of return. This higher rate of return accordingly will be based on the present unimpaired investment and not on investment in superseded property.* In competitive business a manufacturer must adopt the newer and cheaper methods,

even to a complete scrapping of his plant, or have his business taken from him by his more progressive competitors. A municipal monopoly, however, is not subjected to the same pressure—and may sometimes be very backward in applying the scrapping process.

"The hazard from extraordinary supersession is real, but for public service industries not so enormous as it is sometimes pictured. There was a time when it was predicted that gas would be entirely superseded by electricity. The steam railroad at present is confronted with the possibility of electrification, but this will doubtless come about gradually, and will mean the addition of new investment rather than the scrapping of any very large proportion of the existing property."

See, also, the comments of Mr. Whitten, in section 424, on the opinion of this court in *Louisiana Railroad Commission v. Cumberland Telephone and Telegraph Company*, 212 U. S. 414. The learned author, in commenting on this case (p. 363), adds:

"This case is not very clear. It seems to point to a treatment of the depreciation reserve as belonging equitably to the business and not subject to diversion in any way to the stockholders in case it is not needed for the purpose for which it was established. *If invested in improvements or extensions it serves in effect to amortize a portion of the fair value for rate purposes.*"

It seems clear that the defendant state Commission in its opinion accepted a view somewhat similar to that expressed by Mr. Whitten in his last sentence, that the Commission allowed the company a very liberal depreciation, \$590,000 per year. The property was already amortized from its original cost of twelve million dollars to a little less than three and one-half million; that is to say, the revenues of the company had been applied to the discharge of its original indebtedness, which belonged to the plant, until only the above amount remained unpaid. The Commission, in effect, said:

We give you this \$559,000 for depreciation (see Table 5), which you can apply on your indebtedness or invest in extensions, as may seem expedient to you. If invested in extensions, and the extensions do not result in an improved supply of gas and a consequent increase in the value of your property, the loss will be yours. Or, if you do not choose to do this, you can

continue with your present supply of gas, the Commission having no authority to compel extensions beyond the state line, and the adjustment of rates for the future will be a matter of after consideration.

The result of this reasoning would have been to have entirely returned the value of the property in about six years, leaving a fair return in the meantime to the investors and the scrap value of the property for the stockholders.

In this matter the Commission may have been guided to some extent by the terms of the so-called "Creditors' Agreement"—a matter not to be overlooked by this court in considering constitutional grounds for setting aside its order. (Rec. 1010, par. 5.) This Creditors' Agreement, when the suit was converted from a regulatory proceeding prosecuted by the state to one in which the rights of the creditors were also to be preserved, and in a measure put above the rights of the public, provided, in plain terms, that the creditors should set aside for the purpose of making these improvements the sum of \$500,000 for the first year and \$200,000 thereafter. The plain intent of this provision was that the creditors should wait for that much of their money, which meant that the annual depreciation which could be applied to the payment of former indebtedness should be used in building extensions. It was self-evident that the return should not be increased above a reasonable return upon the value of the property employed.

On these questions of the building of extensions and betterments from surplus and the resultant depreciation in property due to its failure to carry out its franchise obligations, see the case of *San Diego Land and T. Co. v. Jasper*, 189 U. S. 439. This case involved the status of a water company whose supply had failed, and the consequent valuation of the property for rate-making purposes. The court, speaking by Mr. Justice Holmes, *l. c.* 447, said:

"It hardly can have meant that a system constructed for 6,000 acres should have a full return upon its value from 500, if those were all that it supplied. At all events, we will not be the first to say so. If necessary to avoid that result, we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute. Upon the whole case we are unable to say that the circuit court should have declared the rates confiscatory. They are the rates which

are fixed by the original company at the start, with prophecies, which the purchasers who believed them think amounted to a contract that they never would be higher. If the original company embarked upon a great speculation which has not turned out as expected, more modest valuations are a result to which it must make up its mind."

Reeder, in his *Validity of Rate Regulations*, section 173, says:

"The cost of maintenance embraces whatever current expenditures are necessary in order to maintain the total value of the property unimpaired; but it does not embrace expenditures which increase the value of that property. It does not seem necessary that the money should be spent only for renewals. If, for instance, upon a new railroad a sum equivalent to the depreciation in property which does not yet require renewal were spent for betterments or extensions, such an expenditure which simply maintained the total value of the property at the original amount should, it seems, be considered legitimate expense of maintenance, although in the case of an older railroad where necessary renewals called for the full amount of the depreciation fund an expenditure for betterments, even though required by the increasing demands for transportation, could not properly be considered an expense for maintenance. So also it seems that the company must be allowed to replace from operating expenditures whatever losses are caused by obsolescence as well as those which are caused by wear and tear or decay. Whatever maintains the total value of the property should be regarded as legitimate expense of maintenance; whatever increases that value should be accounted for under another head."

Wyman on *Public Service Corporations*, in section 1164, says:

"The rule will be generally conceded that outright new construction should be charged to capital and should not therefore be admitted as an annual expense of operation. As Mr. Justice Carter of the Florida court recently put it, in a case where the railroad in complaining of the rates put in force by a commission alleged that its total receipts would not now be sufficient to recoup it for its 'costs of operation' and its 'cost of construction': 'The use of the words "reasonable cost of constructing"



renders the pleading very ambiguous. The reasonable cost of construction is to be considered in determining the fair value of the company's property, which is an element entering into the question of reasonableness of the rate; but the cost of construction is not to be deducted from the earnings under the proposed rates in ascertaining if those rates are reasonable; for under such a rule the public would be compelled to pay for constructing the road without being entitled to its ownership.' So in estimating the net profits of a gas company it was held that operating expenses would not include 'expenditures for new wells, mains, or other permanent improvements or betterments.' "

In the case of *Erie v. Gas Co.*, 78 Kan. 348, referred to in the text just quoted, the Union Pacific cases already referred to are reviewed, and it is held, as quoted in the above text, that "operating expenses will not include expenditures for new wells, mains, or other permanent improvements, nor the cost of supplying gas and making other sales in the profits of which the city does not share."

The supreme court of the United States has also emphatically placed its condemnation upon the proposition of constructing improvements and extensions from service and then proceeding to amortize or charge returns upon such investments. See *Railroad Commission v. Cumberland Telephone & Telegraph Co.*, 212 U. S. 414. The court says, *l. c.* 424:

"It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually

disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate; but to raise more than money enough for the purpose, and place the balance to the credit of capital upon which to pay dividends, cannot be proper treatment. The court below said it was impossible to find out from the books how much of this had been done, and it treated the fact as one to be explained by the Commission, and not by the complainant. In other words, while this fact was a material one, the onus was placed upon the Commission, and not the complainant, to show it. We think, on the contrary, that the obligation was upon the complainant. Now, although the books, it is said, do not show how much money collected for depreciation has been, in fact, used to increase the capital of the complainant, upon which dividends were paid to stockholders, yet still, even if the books do not show accurately, or even at all, what disposition was made of these moneys, at any rate the officers of the complainant must be able to make up some reasonable approximation of the amount, even if it be impossible to state it with entire accuracy; and this duty rests with the complainant, in order that it may discharge the duty devolving upon it to prove that the rates were not unreasonably high under order No. 488, or, in other words, that they were unreasonably low under order No. 552. It may be that the sum, if any, thus used, was not enough to affect the claim that the rates under discussion were unreasonably low. The evidence is insufficient to show clearly that which complainant is under obligations to show. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, ante, 371, 29 Sup. Ct. Rep. 148; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, ante, 382, 29 Sup. Ct. Rep. 192. We are not considering a case where there are surplus earnings after providing for a depreciation fund, and the surplus is invested in extensions and additions."

Not very much doubt remains as to the result of the court's opinion when it comes to consider the case mentioned in the last sentence, if it shall be shown distinctly that surplus has been invested in improvements and extensions.

From the foregoing authorities we think the following principles may be assumed as correct:

(a) That the annual depreciation allowed as a maintenance

charge should be fixed and stable, extending over the entire life of the physical property as nearly as is practicable.

(b) That what is added to the permanent value of the property should not be charged as maintenance in a single year, but should be included, in so far as it is a legitimate charge, in the depreciation for the entire useful life of the plant.

(c) That depreciation should be based upon the physical value of the plant and should not attempt to amortize franchise values, good will, or any other intangible value attached to the business.

(d) That in addition to a fair annual return upon the investment, the investor is entitled to receive during the physical life of his plant a return of the value of his investment, and that this return should be made to him as stated in proposition (a), as nearly as possible upon an equable annual allowance.

(e) The depreciation allowed should be the difference between the value of the property put into the business and its value when the business ceases, allowing meantime reasonable amounts for maintenance, this difference, of course, to be apportioned annually as a part of operating expenses.

Applying these principles and comparing them with the principles applied by the trial court in determining the life of the business as distinguished from the life of the physical plant upon a mere arbitrary basis, we come to the final difference between the conclusions reached by the trial court and the Commission. These differences can readily be seen by comparing the Commission's Table 5 with the conclusions of the court as stated in his opinion. The Commission found the reasonable life of the physical plant to be twenty years. It found its salvage value at the end of twenty years. In a desire to be more than fair with the receiver the Commission did not subtract salvage value from the total investment, but did return to the company the full value of the physical plant during the twenty years. The result of this was to allow the company an annual depreciation of \$549,000. If a part of this, as was suggested in the Creditors' Agreement, was to be reinvested by the company in extensions, then a new capital account was created and the usual depreciation would have been applied. The results of that, under Table 5, would have been correct under the assumption that new investments would be made.

If no new investments were made, the five percent depreciation still would have obtained the correct result. Assuming that the gas company would have supplied the same amount of gas that it had in the past, the return would have been 10.46 percent in addition to returning the property to its owners.

We may observe in passing that the junk value of any new improvement or extension built by the receiver would have been far from negligible. The experience of all public utilities in the last two years has been that second-hand material has been worth far more in the market than reasonable estimates made in the past would have placed upon it. It has taken heroic action on the part of courts and commissions all over the country to prevent the tearing up of pipe lines, railroads, and other utility properties—to prevent their being junked—for the mere profit realized in the salvage value of the materials employed.

It will be said that this is the result of war values, but no one can prophesy concerning the period of the duration of the war, nor as to values in the years immediately succeeding the declaration of peace. No one now can have a sound or clear judgment concerning the basis of prices that will prevail in the country in new industrial conditions that will come in the next ten years. The only thing that is certain is that the lower basis of prices which obtained in the last decade will not be met with again during the present generation, and that therefore a value fixed upon a reasonable trend of prices for a period of years in the past will be more than fair to the company when applied to salvage.

Carrying out our comparison, however, let us examine the method adopted by the trial court. Under the term of "requirements of the company for operating expenses" large amounts were allowed for extensions, and it was found as a basis for the order of temporary injunction that more than a million dollars had been paid to the creditors, which, in equity, should have been invested in extensions for the purpose of securing a gas supply. It was ordered, therefore, that one-half million dollars be immediately invested in extensions and charged to operating expenses of the company. Just why the fact that the creditors had received a million dollars to which they were not entitled was a reason that the consumers should be called upon to contribute an extra half million dollars in the next en-

suing year is not perceived. Moreover, in addition to this, the consumer was called upon to contribute \$200,000 annually on the assumption that such extensions might be needed for a period of about five years, or for eternity, for that matter, if the gas could be found, for it was placed and estimated to be as an annual charge upon the property.

Now for the result. The receiver attempted an expenditure of the \$500,000. Before \$250,000 had been invested, or rather used in the purchase of pipe for intended extensions, the receiver's plans, like all "the plans o' mice and men ganged agley." No extensions were made, no more gas was procured, and yet the consumer paid the increased cost based upon a proposed capital investment of the company. There is not the least assurance that the company will ever make an extension or ever secure a better supply of gas than it now has. It would seem, therefor, that the conclusion of the Commission was as nearly correct as could be expected, that instead of being confiscatory and unconstitutional it was the only course that would at all protect the consumer.

As is repeatedly stated in the opinion of the court, the Commission had no power to enforce the building of these extensions, and it follows that if it had allowed for them without compelling the expenditure of the money according to the estimate, that it would have been not only gambling with the consumers' money, but would have placed it where the creditors of the company, under the Creditors' Agreement, could do as they had done in the year next preceding the order—pocketed another million dollars upon which the consumers had the first rightful claim.

#### **The value of gas at the wells.**

The appellants called the attention of the trial court to the fact that there was no evidence in the record that any company was selling gas as high as six cents at the wells, and we respectfully call the attention of this court to the same fact.

The Commission based its findings of four cents as a reasonable amount to pay for this gas, upon the past history of the field. The receiver contends that he will be compelled to pay a much higher price for gas than that, and in his supplemental bill of complaint contends that he will have to pay seven cents.

The Commission's investigation shows that most of the gas purchased by the Kansas Natural cost him three cents. It is true that the receiver is paying six cents for large quantities of gas. This gas he buys from Mr. Braden, who is one of the stockholders of the Kansas Natural Gas Company. (Rec. 1101.) That amount is being paid for no other large quantities of gas by the Kansas Natural, and the testimony here shows that there is any quantity of gas for sale within reach of the Kansas Natural's line at from 2½ to 3 cents a thousand cubic feet at the wells.

It is also to be noticed that this gas that is bought of Mr. Braden is piped from the wells by Mr. Braden's company to the lines of the Kansas Natural. (Rec. 1089-1094.) In its allowance the Commission set aside a fairly good sum to transport this gas from the wells to the Kansas Natural's pipe lines. If the Kansas Natural could receive all the gas it needed for six cents and have it delivered from the wells to its present pipe line the rate fixed by the Commission would still be adequate, because it would have no field expense in gathering this gas and no expense for the extension of its lines. It is not controlling that the Kansas Natural is buying gas from one of its stockholders for six cents when the general price at the wells in the fields is far below that amount.

The undisputed testimony is that for the year ended June 30, 1916, the Wichita Natural Gas Company had paid approximately four cents for its gas. The testimony of Bartlett was that gas was three and one-half to four cents at the wells (rec. 1096-1101), and the specific testimony of York was that even in the vicinity of the Kansas Natural's line the average price of gas at the wells was from three to three and one-half cents. There has been no testimony introduced in this case to show that allowance was not adequate. We call attention of the court, however, to the fact that Mr. Doherty and Mr. York (rec. 1101), as well as all other witnesses who testified in the case at the last hearing, testified that the average price for gas at the well was three cents. The Commission allowed a reasonable sum for the transporting of gas from the wells to its trunk line. Of course, this does not include the gas on Osage leases. The amount delivered, however, to the Kansas Natural from there is small and does not bring up the general average to an important extent. The court should keep in

mind that the question is not, what will the future price of gas be (rec. 1096-1101), but what is the price at the present time, in considering whether the rate prescribed by the Commission is confiscatory.

The supreme court of the United States, in the case of *Newark Natural Gas & Fuel Company v. Newark*, 37 Sup. Ct. Rep. 156, considered a question somewhat analogous to the one presented here. In that case the local distributing company of natural gas was required by an ordinance of the city of Newark to establish a rate for five years, and the city brought an action to compel them to put in the rate. The company answered that they were a distributing company and that the gas was supplied to them by a pipe-line company and that the gas fields were becoming depleted and that the city had not taken into consideration the production property in fixing the rate, and further contending that they had a contract with the pipe line for only two years, whereas the ordinance required them to establish the rate for five years. But the court sustained the city ordinance and required the establishment of the rate. The second paragraph of the syllabus reads as follows:

"The property of a gas-distributing company cannot be said to have been taken without due process of law, contrary to U. S. Const. 14th Amend., by a decree which enforced, without prejudice, to the right to apply thereafter for a modification, a municipal ordinance fixing gas rates for five years, where there was no claim that the company could not operate profitably under such ordinance so long as its contract with a producing gas company, under which the latter was to furnish gas to the former upon the basis of a percentage of meter readings which had two or three years to run when the suit was commenced, remained in force, and no evidence was offered to show the rate paid by the distributing to the producing company after the expiration of such contract."

#### Supply of gas—Administrative, not judicial.

While it appears from the pleadings that whether the 28-cent rate is confiscatory is in the case for the service now being furnished, it is manifest that the relief demanded and expected by the complainant is something that would relieve it from performing the service it was bound to perform under its charter agreements. It is admitted by the gas companies that



they are not performing their franchise duties, and they should not be heard to say that the service which they perform at the rates prescribed by the public administrative body, somewhat higher than those prescribed by said franchises, are noncompensatory.

Failure to perform franchise duties cannot be excused on the ground of poverty. Especially is this true where it appears that were the service performed the rate would undoubtedly prove sufficient. In the case of *People v. McCall* (New York App.), 113 N. E. 795, was one where a gas company had been ordered to build an extension into a certain part of the city covered by its franchise, and it was contended that the building of the extension would result in pecuniary loss to the company in the matter of returns. But the order of the Commission was sustained, the court saying (page 797) :

"In Douglaston and the neighboring territory in the Third ward of the borough of Queens covered by the relator's franchise, there are some 332 houses. The occupants of these houses can get no gas unless they are supplied by the relator. It is the duty of the relator to supply their needs if practicable. *Wisconsin, M. & P. R. R. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *People, ex rel. Woodhaven Gas Light Co., v. Deehan*, 153 N. Y. 528, 47 N. E. 787. The cost of the extension is not the only matter for consideration. *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 529, 32 Sup. Ct. 535, 56 L. Ed. 863."

Now, Mr. Doherty said, and in this he was confirmed by every expert who testified, including Mr. Guthrie of the Olathe Gas Company, that the only solution of the problem presented was either that certain territory which was now being served under these franchises be cut off from a supply of gas, or else that such rate be fixed as would result in the use of gas only for cooking and lighting purposes. We fail to see the difference in compelling a gas company to supply certain territory covered by its franchise and permitting it to abandon territory already supplied for the purpose of increasing the net return of the company. In either case the permissive order is administrative and not judicial.

It is admitted that if the supply of gas were adequate the rate would be adequate. It is therefore impossible for this

court to say, from the evidence, that the operation of the 28-cent rate, aside from its voluntary features, would unlawfully take the property of the receiver. This is also an elementary proposition and lies at the very basis of the jurisdiction of this court to grant relief in equity. A very clear defense of this proposition of law is found in a speech delivered by Senator Chester I. Long in the United States senate May 11, 1906, on the Hepburn bill, pointing out the evil effects which would flow from the court entering the realm of administration to review the orders of commissions for any other purpose than that of deciding upon the constitutionality and reasonableness of regulations prescribed. Lack of space prevents a lengthy quotation, but among other things the senator said:

"My amendment did nothing more than to make clear in words the limitation that the supreme court of the United States has prescribed for itself in the consideration and determination of these questions."

Quoting from the *San Diego Land Company Case*, 174 U. S. 754, Senator Long further said:

"The only issue properly to be determined by final decree in this cause is whether the ordinance in question fixing rates for water supplied for use within the city, is to be stricken down as *confiscatory by its necessary operation*, and therefore in violation of the constitution of the United States."

In the case of *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 266, the court, speaking by Mr. Justice White, said:

"The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard and an order compelling the corporation to render a service which it was essentially its duty to perform was pointed out in *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1. In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld despite the fact that it was conceded that the return from the operation of such train would not be remunerative."

Speaking of the distinction between the two, it was said (page 26) :

"This is so (the distinction) because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, *necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole system of rates was unreasonable under the doctrine of Smyth v. Ames, 169 U. S. 526, 42 L. Ed. 842, 18 Sup. Ct. Rep. 418.*"

It is admitted that the whole scheme of rates is not confiscatory, for the receiver is charging less than the amount allowed on twenty percent of the product; on another one-fifth to one-fourth the rate is higher than the contract rates.

Again the court said:

"But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable."

The necessary conclusion from this law is that a utility should not be heard to plead confiscation where it is admitted that the service being furnished is inadequate. This doctrine has been carried to the extent of taking all, or practically all, of the property of the utility. The corporation can be relieved from its public duty only by legislative authority, or in some cases, by executive consent, such as a suit by the attorney-general to wind up the affairs of the company. In other words, when the corporation has provided the service provided for by its charter it may then plead that the rates prescribed by the legislature are confiscatory, but until that is done there is no equity in its case and there is no way to tell whether, if the duty were performed, the remuneration provided by the legal rates would be compensatory. The order of the Public Utilities Commission is, under the law, presumed to be reasonable

and compensatory. At the risk of repetition we again call attention of the court to the rule announced by the supreme court of the United States in the *Knoxville v. Knoxville Water Co.* case, 212 U. S. 16, 17:

"To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts. The same thought, in effect, was expressed in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154, 1160, 19 Sup. Ct. Rep. 804, 810: 'Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' And in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to reëxamine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.'

"We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt."

Again, equity is not bound by the mere form of pleadings or the letter of plaintiff's demand for relief. It should look beyond the mere forms of the pleadings to discern the plaintiff's real intentions in bringing the suit and the ends sought

to be attained by it. If underneath all of this there is an evident intention which is inequitable and which seeks to set aside the plain provisions of the law and accomplish a result legislative in character rather than judicial, and one which the plaintiff is in law and good conscience bound to seek from a legislative tribunal, equity should not give relief, and in reality has no jurisdiction to do so. In *Jencks v. Quibnick Co.*, 105 U. S. 477, the court, speaking by Mr. Justice Brewer, said:

"The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but to leave the party to his remedy at law.

"Where a purchase is one simply to speculate upon the chances of successfully attacking transfers of large property made for the benefit of creditors and to deprive them of the benefits of such transfers, equity refuses to be bound by the letter of legal procedure or to lend its aid to such mere speculative purchase which threatens injury and ruin to honest creditors who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

"Where there is a scheme for great personal gain at the expense of equally deserving creditors, coupled with long delay, equity will refuse to lend its aid to the accomplishment thereof."

The general equitable doctrine of this case is applicable to the instant cause. The relief sought is not a mere striking down of the 28-cent rate, but a readjustment of the administration of the property which will breathe vitality into stock which was dead timber under the original organization of the corporation and to keep it alive for mere speculative purposes in the interest of a purchaser who acquired that stock during the legal difficulties of the company and now expects to profit by such speculative adventures at the expense of the patrons of the company. These patrons have paid enough for an inefficient service to guarantee every creditor in money and to replace every dollar which has been placed in the property, but still the speculators demand, in angry arrogance, that a rate be fixed by some tribunal which will guarantee them un-

reasonable profits in future speculation. The receiver has come to represent virtually these speculators, no longer the public, and the creditors, being secure, have apparently lost interest. A decree is desired to relieve the company of its corporate duties so that the investing public may be imposed upon by what appear to be high rates, or if such speculative scheme shall fail and the property be wrecked, during the wrecking process, money may be put into the pockets of the pillagers who loot the wreckage.

### CONCLUSION.

It is unnecessary to comment on the results shown by Table 5 of the Commission as compared with the conclusions of the court, if the propositions we have discussed as errors of the court are determined in favor of our contentions. In that event Table 5 shows the correct results of the order made by the Commission and shows that the allowances made to the gas company were liberal indeed.

On the other hand, if the theory of fixing the life of the property according to the probable life of the field be adopted, then, as suggested in the Goldsborough case, the same theory should apply throughout the entire life of the property. If the property, as the trial court finds, has still five years to live, its natural death would occur in 1922, or in sixteen years after its origin in 1906. Then the value of the property should be amortized on the basis of sixteen years, eleven years of which had transpired at the time of the trial of the case. The result would be that nearly three-fourths of the property has, or should have been, taken care of by the annual depreciation, for depreciation which the company fails to provide for cannot be taken account of to its credit. The value of the entire twelve-million-dollar property would now be three million dollars, less than a million and a half of which could be assigned to Kansas as a basis of fair value for rate making. It goes without saying that the figures given in Table 5 for operating expenses and revenues, when applied to this valuation, would show a handsome return.

The questions discussed, therefore, as to the correctness of the court's opinion are essentially questions of law, and these, with the questions of interstate commerce and that of whether there was equity in plaintiff's bill, must settle the controversy.

The question of a supply of gas and the best manner in which the rate at different places should be applied to produce the most revenue for the company are essentially questions of administration, and not legal questions, and certainly this court will not assume to set aside the order of the Commission because of the difference of opinion, if one should exist, as to these matters.

Upon the whole we submit that the complainant has failed to show such a case as warrants the interference of a court of equity in his behalf.      Respectfully submitted.

FRED S. JACKSON.

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Kansas et al.*



## APPENDIX A.

### PUBLIC UTILITIES COMMISSION LAW.

**Creation and General Powers.** The Board of Railroad Commissioners of the state of Kansas is hereby constituted and created a Public Utilities Commission for the state of Kansas, and such commission is given full power, authority and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction. (Sec. 8327, G. S. 1915; sec. 1, ch. 238, Laws 1911.)

For laws relating to Board of Railroad Commissioners, see secs. 8389-8452, G. S. 1915.

Power to supervise and control utilities described in section 3. The State, *ex rel.*, v. Gas Co., 88 K. 165; City of Emporia v. Telephone Co., 90 K. 118.

Section 3 contains only exception to unlimited control by commission. The State, *ex rel.*, v. Water Co., 92 K. 227.

Water company held subject to control of Public Utilities Commission. The State, *ex rel.*, v. Water Co., 92 K. 227.

Mere enactment of act did not abrogate telephone agreements, etc. Kaul v. Telephone Co., 95 K. 1.

Power to regulate and control location of telegraph stations. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 298.

Power necessary to exercise of specific powers is likewise conferred. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 304.

**Powers of Railroad Board Conferred.** All laws relating to the powers, duties, authority and jurisdiction of the Board of Railroad Commissioners of this state are hereby adopted, and all powers, duties, authority and jurisdiction by said laws imposed and conferred upon the said Board of Railroad Commissioners, relating to common carriers, are hereby imposed and conferred upon the commission created under the provisions of this act. (Sec. 8328, G. S. 1915; sec. 2, ch. 238, Laws 1911.)

For laws relating to Board of Railroad Commissioners, see secs. 8389-8452, G. S. 1915.

Unauthorized corporate acts challenged by attorney for Public Utilities Commission. Telephone Co. v. Telephone Association, 94 K. 163.

Powers, duties, etc., of railroad commissioners conferred upon Utilities Commission. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 298.

Section virtually extends power over railroads to all public utilities. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 304.

**Definitions.** The term "public utility," as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipe lines in or through any part of the state, except pipe lines less than fifteen miles in length and not operated in connection with or for general commercial supply of gas or oil, or for the operation of any trolley lines, street, electrical or motor railway doing busi-

ness in any county in the state; also all dining car companies doing business within the state, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power; provided, that this act shall not refer to or include mutual telephone companies. That mutual telephone companies, for the purposes of this act, shall be understood to mean any cooperative telephone company operating only for the mutual benefit of its subscribers without profit other than in the service received. Nothing in this act shall apply to any public utility in this state owned and operated by any municipality. The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in section 33 of this act. (Sec. 8329, G. S. 1915; sec. 3, ch. 238, Laws 1911.)

Meaning of term "public utility": physical equipment, etc., not included. *The State, ex rel., v. Gas Co.*, 88 K. 165.

Scope of jurisdiction: utility owning equipment in several cities. *The State, ex rel., v. Gas Co.*, 88 K. 165.

Telephone company held subject to control of Public Utilities Commission. *City of Emporia v. Telephone Co.*, 90 K. 119.

Water company held subject to control of Public Utilities Commission. *The State, ex rel., v. Water Co.*, 92 K. 227.

Exception not restricted to utilities municipally owned when act passed. *Humphrey v. City of Pratt*, 91 K. 413.

Mere enactment of act did not abrogate telephone agreements, etc. *Kaul v. Telephone Co.*, 95 K. 1.

Power to regulate and control location of telegraph stations. *The State, ex rel., v. Postal Telegraph Co.*, 96 K. 298.

Receivers operating business of public utility subject to Utilities Commission. *The State, ex rel., v. Flannelly*, 96 K. 372.

**Definition of "Common Carrier."** The term "common carriers," as used in this act, shall include all railroad companies, express companies, street railroads, suburban or interurban railroads, sleeping-car companies, freight-line companies, equipment companies, pipe-line companies and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state. (Sec. 8330, G. S. 1915; sec. 4, ch. 238, Laws 1911.)

Public utility defined. *The State, ex rel., v. Gas Co.*, 88 K. 165; 231 U. S. 622 (14 L. Ed. 404).

Section legislative construction that railroads, street railroads, etc., distinctive organizations. *O'Malley v. Riley County*, 96 K. 757.

**Jurisdiction.**—The Public Utilities Commission for the State of Kansas has full power, authority and jurisdiction to supervise and control all public utilities described in section 3 of the act, with the exceptions therein specified, and a public utility which owns or operates a separate equipment, plant or machinery for any of the specified purposes in two or more cities is not within such exceptions. *The State, ex rel., v. Gas Co.*, 88 K. 165.

"A telephone company with one-fourth of its phones outside of the city and one-fifth of its value for taxation being outside of the city is within the provisions of this section." *City of Emporia v. Emporia Telephone Co.*, 90 K. 119.

"A waterworks company furnishing four-ninths of the total amount of its water to consumers outside of the city is within the provisions of this section." *State, ex rel., v. Water Co.*, 92 K. 227.

**Appointment and Construction of Board.** The present members of the Board of Railroad Commissioners, which board has been constituted and created by this act as a Public Utilities Commission, shall retain their respective offices for the terms for which they were elected and until their successors are appointed and qualified and shall receive no

additional salary as members of the Public Utilities Commission. Thereafter, the said Public Utilities Commission shall be composed of three commissioners who shall be appointed by the governor, by and with the advice and consent of the senate, one of whom shall be a practical, experienced business man, and one experienced in the management or operation of a common carrier or public utility. Of such three persons, one shall be appointed and designated to serve for a term of one year, one for a term of two years, and one for a term of three years, said term to begin upon the qualifications of the person appointed therefor. Upon the expiration of the terms of the three commissioners first to be appointed as aforesaid, each commissioner shall be appointed and shall hold his office for the term of three years, and until his successor shall have been qualified. In case of a vacancy in the office of the commission, the governor shall appoint his successor to fill the vacancy for the unexpired term. After the expiration of the present term of the present members of said commission, the salary of each commissioner shall be four thousand dollars per year; provided, that not more than two members of said Public Utility Commission shall be of the same political party. (Sec. 8331, G. S. 1915; sec. 5, ch. 238, Laws 1911.)

**The Secretary of the Commission.** The secretary for the Board of Railroad Commissioners shall hereafter be the secretary of the Public Utilities Commission, and his office shall hereafter be known as the office of the secretary of the Public Utilities Commission, and he shall receive the same salary as is now prescribed by law for the secretary of the Board of Railroad Commissioners, and he shall be appointed by the Public Utilities Commission in the manner and for the time as is now prescribed by law for the appointment of a secretary of the Board of Railroad Commissioners; and he shall have the powers and perform the duties now devolving upon the secretary of the Board of Railroad Commissioners. (Sec. 8332, G. S. 1915; sec. 6, ch. 238, Laws 1911.)

**The Attorney for the Commission.** The attorney for the Board of Railroad Commissioners shall hereafter be the attorney of the Public Utilities Commission, and his office shall hereafter be known as the office of the attorney of the Public Utilities Commission, and he shall receive a salary of twenty-five hundred dollars per year, and he shall be appointed by the commission for a term of two years, and he shall have the same powers and perform the duties now devolving upon the attorney for the Board of Railroad Commissioners; and he shall act as counsel for the Public Utilities Commission, and perform such other duties as shall be imposed on him by the Public Utilities Commission. He shall appoint a stenographer, who shall receive a salary of twelve hundred dollars per annum. (Sec. 8333, G. S. 1915; sec. 7, ch. 238, Laws 1911.)

**Qualifications and Powers of Commissioners and Officers.** No person owning any bonds, stocks or property in any railroad company or other common carrier or public utility, or who is in the employment of, or who is in any way or manner pecuniarily interested in, any railroad company or other common carrier or public utility, shall be eligible, except as hereinafter provided, to the office of commissioner, attorney or secretary of said commission, nor shall such commissioner, attorney or

secretary hold any office of profit or any position under any committee or any political party, or hold any other position of honor, profit or trust under or by virtue of any of the laws of the United States or of the state of Kansas. Said commissioners shall be qualified electors of the state, and shall not while such commissioners engage in any occupation or business inconsistent with their duties as such commissioners. And if any member of the commission, at the time of his appointment, shall own any bonds, stock or property in any railroad company or other common carrier or public utility, or is in the employment of, or is in any way or manner pecuniarily interested in any railroad company or any common carrier or public utility, such commissioner or other appointee shall within thirty days divest himself of such interest or employment, and upon his failing to do so he shall forfeit his office, and the governor shall remove such commissioner and shall appoint his successor, who shall hold until a successor is appointed and qualified. Each of said commissioners, attorney and secretary shall be sworn, before entering upon the discharge of the same, to faithfully perform the duties of the respective offices. Each of said commissioners shall enter into a bond, with security to be approved by the governor, in the sum of ten thousand dollars, conditioned for the faithful performance of his duties. Said commissioners shall have the power to appoint one rate clerk, who shall be an expert, and who shall receive a salary of not to exceed five thousand dollars a year; one stenographer who shall receive a salary of one thousand dollars per year; one stenographer who shall receive a salary of nine hundred dollars per year; and two clerks, who shall receive a salary of nine hundred dollars per annum each; and said Public Utilities Commission is also authorized and empowered to employ subject to the approval of the governor, such other extra accountants, engineers, experts and special assistants as in its judgment may be necessary and proper to carry the provisions of this act into effect and fix their compensation; and such rate clerk, stenographers and clerks shall hold their office during the pleasure of said commission; provided, that no person related by blood or marriage to any member of such commission shall be employed or appointed to any place or position under the provisions of this act. (Sec. 8334, G. S. 1915; sec. 8, ch. 238, Laws 1911.)

**Powers of Commission.** The commission shall have power to adopt reasonable and proper rules and regulations to govern its proceedings including the assessment and taxation of costs on any complaint provided for in section 23 hereof, and to regulate the mode and manner of all investigations, tests, audits, inspections and hearings not specifically provided for herein. The commission may confer with officers of other states and officers of the United States on any matter pertaining to their official duties. (Sec. 8336, G. S. 1915; sec. 9, ch. 238, Laws 1911.)

"The Public Utilities Commission, succeeding to all the powers conferred upon the State Board of Railroad Commissioners and by its own enlarged powers conferred by later enactments, has power to supervise the conduct of public service corporations in this commonwealth." *State v. Kansas Postal Telegraph Cable Co.*, 150 Pac. 544; 96 K. 294.

**Rates of Charges, Service, etc.** Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the

use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier and to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions and to make just and reasonable rules, classifications and regulations; and every unjust or unreasonable discriminatory or unduly preferential rule or regulation, classification, rate, joint rate, fare, toll or charge demanded, exacted or received is prohibited and hereby declared to be unlawful and void, and the Public Utilities Commission shall have the power, after notice and hearing of the interested parties, to require any common carriers and all public utilities governed by the provisions of this act to establish and maintain just and reasonable joint rates wherever the same are reasonably necessary to be put in, in order to maintain reasonably sufficient and efficient service from such public utilities and common carriers. (Sec. 8337, G. S. 1915; sec. 10, ch. 238, Laws 1911.)

**DISCONTINUANCE OF SERVICE FOR NONPAYMENT.** (Pond on Public Utilities, sec. 220.) "As a necessary consequence of this rule it follows that a customer who is in default for the payment of his service and who fails to pay for the service already rendered cannot complain if the service is discontinued pending his payment for that already received. This is recognized as a convenient means of making collection, for as the court in the case of *State, ex rel. Lathshaw, v. Board of Water & Light Com'rs*, 103 Minn. 472, 117 N. W. 827, 127 Am. 79, 381, decided in 1902, says: 'Both on reason and authority the method of collection here in issue was reasonable and proper. With unusual unanimity, such regulations have been sustained altho where there is statutory authority and where there is not. The imposition of a fifteen percent penalty or discount and of certain costs and expenses of shutting off the gas and turning it on as parts of the arrearage charged relator does not entitle relator to the mandamus he seeks.'"

The weight of authorities seems to be to the effect that where a municipality grants to a public utility the right to adopt such a rule that service may be discontinued for the nonpayment of bills for past service. The case referred to by Pond seems to be controlling, but under the common law such a rule would not obtain. Neither could such a rule apply requiring one to pay arrears of a predecessor.

Vol. I, sec. 436, Wyman on Public Ser. Corp.: "No requirement to pay arrears of predecessors. It is well agreed that this disability is a personal matter. When a householder applies to a gas or water company for a supply of gas or water at his house, and tenders the price, if it is required, or a deposit in advance, he can not be refused because an independent earlier occupant of the premises is in arrears for his gas or water. To so hold would in effect decide that the supply is to the premises, not (as it plainly is) to the occupants. However, it is possible for legislative action to alter this common law and to provide for such a charge upon the premises either by statute or charter provision, or by ordinance or (according to a very few cases) by regulation of which all concerned are apprised."

This subject is well discussed in 49th L. R. N., page 596.

Act requires each utility to establish just and reasonable rates. *City of Emporia v. Telephone Co.*, 96 K. 126.  
 Facts considered in determining whether rate is unprofitable. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Rates established by Utilities Commission presumed to be reasonable. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Railroad entitled to fair profit on each commodity transported. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Voluntary rates established by railroads basis for fixing reasonable rates. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 "Unreasonable, unjust, oppressive and unlawful" not synonymous with "confiscatory." *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Power to regulate and control location of telegraph stations. *The State, ex rel., v. Postal Telegraph Co.*, 96 K. 298.  
 Commission has power to require reasonably efficient and sufficient service. *The State, ex rel., v. Postal Telegraph Co.*, 96 K. 304.  
 Privilege of unloading on route, etc.; contract preferential and discriminatory. *Mollohan v. Railway Co.*, 97 K. 51.

**Filing Schedules of Rates.** Every public utility and every common carrier doing business in Kansas, over which the Public Utilities Commission have control, shall publish and file with the Public Utilities Commission copies of all schedules of rates, joint rates, tolls, fares, charges, classifications and divisions of rates affecting Kansas traffic, either state

or interstate, and shall furnish said commission with copies of all rules, regulations and contracts between common carriers or public utilities pertaining to any and all services to be rendered by such public utility or common carrier. The Public Utilities Commission shall have power to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs, and classifications of all rates, joint rates, tolls, fares, charges and all rules and regulations of such utilities and common carriers. (Sec. 8338, G. S. 1915; sec. 11, ch. 238, Laws 1911.)

Act requires schedules to be filed with Commission. *City of Emporia v. Telephone Co.*, 90 K. 126.

Tariffs filed with Public Utilities Commission control; special contracts void. *Mollohan v. Railway Co.*, 97 K. 51.

**Charging More than Published Rate.** No common carrier or public utility governed by the provisions of this act shall, knowingly or willfully, charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates; or demand, collect or receive any rate, joint rate, toll, fare or charge not specified in such schedule or classification; provided, that rates different from those specified in the printed schedule or classification of rates may be charged by any public utility, street or interurban railway, by agreement with the customer, in cases of charity, emergency, festivity or public entertainment; provided, that any utility governed by the provisions of this act may grant to the officers, employees and agents of such utilities free or reduced rates or service upon like terms and in the same manner as is now provided by law relating to common carriers. (Sec. 8339, G. S. 1915; sec. 12, ch. 238, Laws 1911.)

Act prohibits charging higher rates than those shown by schedules. *City of Emporia v. Telephone Co.*, 90 K. 126.

Tariffs filed with Public Utilities Commission control; special contracts void. *Mollohan v. Railway Co.*, 97 K. 51.

Privilege of unloading en route must be included in schedules. *Mollohan v. Railway Co.*, 97 K. 51.

"Where the tariffs of the carriers filed with the Public Utilities Commission specify the points at which live stock may be stopped in transit to test the market, any special contract enlarging that privilege which is not specified in such tariffs is void." *Mollohan v. Railway Co.*, 97 K. 51.

"As to the right of a public utility or common carrier to give service in payment for franchise rights or for other considerations than money, see *Louisville & N. R. Co. v. Mottley*, 219 U. S. 466, 55 L. Ed. 297, and notes thereunder. Also, *N. Y. C. & H. R. R. Co. v. Gray*, 239 U. S. 583, 60 L. Ed. 451."

**Complaints, Investigations, Orders.** It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, prac-

tice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the order of this commission, or if it be found that any service is inadequate or that any reasonable service can not be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity and convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions. (Sec. 8340, G. S. 1915; sec. 13, ch. 238, Laws 1911.)

"Unreasonable, unjust, oppressive and unlawful" not synonymous with "confiscatory."  
*Railroad Co. v. Utilities Commission*, 95 K. 604.

**Complaints, Investigations, Orders.** Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory, or unduly preferential, or that any service performed or to be performed by such public utility or common carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or can not be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such commission shall have power to make or to hold may be made or held before any one or more commissioners, and all investigations, hearings, decisions and orders made by a commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the Public Utilities Commission, when approved and filed by such commission and filed in their office, and the commission shall have power to require such public utilities and common carrier to make such improvements and do such acts as are or may be



required by law to be done by such public utility or common carrier. (Sec. 8341, G. S. 1915; sec. 14, ch. 238, Laws 1911.)

Power to regulate and control location of telegraph stations. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 298.  
Acts which are subject to supervision and control by Commission. The State, *ex rel.*, v. Postal Telegraph Co., 96 K. 304.

**Notice, Hearing and Evidence.** Whenever notice shall be required by the provisions of this act to be given any common carrier or public utility governed by the provisions of this act, and the complainant, or either of them, thirty days' written or printed notice of the time and place when and where such investigation or hearing will be had shall be given, such notice to be served by mailing a copy thereof to the public utility or common carrier and complainant. Such notice shall embody in substance the complaint, if any, made against the public utility or common carrier upon which the hearing, investigation and decision of the Public Utilities Commission is requested or on which it will be given. The public utility or common carrier, or the complainants, if any, shall be entitled to be heard, and shall have process to enforce the attendance of witnesses and the production of books, papers, maps, contracts, reports and records of every description affecting the subject matter of the investigation. The Public Utilities Commission may, without præcipe or demand therefor, require the production of any books, papers, contracts, records or other documents in the possession of or under the control of the common carrier, public utility, complainant or complainants, affecting the subject matter of the controversy. (Sec. 8342, G. S. 1915; sec. 15, ch. 238, Laws 1911.)

**Orders of the Commission.** If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly

certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect. (Sec. 8343, G. S. 1915; sec. 16, ch. 238, Laws 1911.)

Section provides for review and correction of order or decision. *City of Emporia v. Telephone Co.*, 90 K. 126.

Facts considered in determining whether rates are unprofitable. *Railroad Co. v. Utilities Commission*, 95 K. 605.

Rates established by Utilities Commission presumed to be reasonable. *Railroad Co. v. Utilities Commission*, 95 K. 605.

Railroad entitled to fair profit on each commodity transported. *Railroad Co. v. Utilities Commission*, 95 K. 604.

When rate "unreasonable, unjust, oppressive and unlawful" as against carrier. *Railroad Co. v. Utilities Commission*, 95 K. 604.

Voluntary rates established by railroads basis for fixing reasonable rates. *Railroad v. Utilities Commission*, 95 K. 605.

Section provides procedure for changing rules, regulations, etc.; judicial review. *The State, ex rel. v. Postal Telegraph Co.*, 96 K. 305.

Action for review must be brought within thirty days. *Telephone Co. v. Utilities Commission*, 97 K. 139.

**Compelling Witnesses to Testify.** No person shall be excused from testifying or from producing any books, accounts, maps, papers or documents in any action or proceeding, based upon or growing out of any alleged violation of any of the provisions of this act, on the ground or for the reason that the testimony or evidence, documentary or oral, required from him, may tend to incriminate him or subject him to penalty or forfeiture; but no person having so testified shall be prosecuted or subject to any penalty, punishment or forfeiture on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence, providing that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. (Sec. 8344, G. S. 1915; sec. 17, ch. 238, Laws 1911.)

**Orders in Effect—Reasonable.** All orders, regulations, practices, services, rates, fares, charges, classifications, tolls, and joint rates fixed by the commission shall be in force and effect on and after thirty days from the making thereof and expiration of thirty days after service aforesaid, shall be *prima facie* reasonable unless, or until, changed or modified by the commission or in pursuance of proceedings instituted in court as provided in this act. (Sec. 8345, G. S. 1915; sec. 18, ch. 238, Laws 1911.)

The burden is upon the carriers to overcome the presumption that the rates ordered established by the Public Utilities Commission are reasonable. *Railroad v. P. U. C.*, 95 K. 604.

Section provides for review and correction of orders and decisions. *City of Emporia v. Telephone Co.*, 90 K. 126.

Rates established by Utilities Commission presumed to be reasonable. *Railroad Co. v. Utilities Commission*, 95 K. 605.

**Orders to Be in Effect.** All findings, rates, joint rates, fares, tolls, charges, rules, regulations, classifications and schedules fixed and established by the Public Utilities Commission shall be in full force and effect, and all regulations, practices, services and acts prescribed or required by the Public Utilities Commission to be done or carried into effect unless otherwise found and determined or stayed by a court of competent juris-

diction as hereinafter provided. (Sec. 8346, G. S. 1915; sec. 19, ch. 238, Laws 1911.)

Enforcement of orders of Utilities Commission; mandamus. *The State, ex rel., v. Flannelly*, 96 K. 372.

**Making Changes in Rates.** Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection. (Sec. 8347, G. S. 1915; sec. 20, ch. 238, Laws 1911.)

A public utility or common carrier can not discontinue any established service without first having obtained authority of the Commission. *The State, ex rel., v. Postal Telegraph Co.*, 96 K. 298, 150 Pac. 544.

The courts have no rate-making powers. The legislature can not confer such powers upon them. *Railroad Co. v. Utilities Commission*, 95 K. 604.

Special privilege can not be granted unless tariff filed, etc. *Mellohan v. Railway Co.*, 97 K. 51.

Change in rates not made without consent of Utilities Commission. *Telephone Co. v. Utilities Commission*, 97 K. 136.

Gas company can not require meter deposits or additional penalty above established rate. *City of Columbus v. Gas Co.*, 96 K. 367.

A public utility cannot change any rule or regulation or practice pertaining to rates or service without consent of Commission. *City of Scammon v. Gas Co.*, 98 K. 812.

A gas company can not discontinue an established service without consent of Commission. *The State, ex rel., v. Landon*, 100 K. 593.

**Setting Aside Orders.** Any common carrier or public utility governed by the provisions of this act, or other party in interest, being dissatisfied with any order of the commission fixing any valuation, toll, rate, joint rate, fare, charge or findings, rules or regulations, classifications, schedules, or any order or ruling fixing any regulations, practices or service, or order or ruling relating to the issuance of stocks, bonds or other securities hereinafter provided may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the Public Utilities Commission as defendant, to vacate and set aside any such order, finding or decision of the Public Utilities Commission on the ground that the valuation, toll, rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable, or that any such regulation, valuation, practice or service fixed in such order or decision is unreasonable. All actions brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different

nature pending in such court, and such action shall be tried and determined as other civil actions. Appeals from any decision of the district court shall be taken from the district court to the supreme court of the state of Kansas, in the same manner as provided by law in other civil actions. During the pendency of any action under the provisions of this act, all orders made by the Public Utilities Commission prescribing rates, joint rates, tolls, fares, charges, rules, regulations, classifications or schedules or findings shall, unless temporarily stayed or enjoined, remain in full force and effect until final judgment is rendered therein. During the pendency of such appeal the judgment of the lower court shall remain in effect, unless stayed by order of the supreme court. Service of summons on any member of the board shall be sufficient service on the board. (Sec. 8348, G. S. 1915; sec. 21, ch. 238, Laws 1911.)

Restraining order and temporary injunction distinguished; appeal. *City of Emporia v. Telephone Co.*, 90 K. 118.  
 Power of courts to enjoin rates allowed by Commission, considered. *City of Emporia v. Telephone Co.*, 90 K. 118.  
 Facts considered in determining whether rates are unprofitable. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Railroad entitled to fair profit on each commodity transported. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 "Unreasonable, unjust, oppressive and unlawful," not synonymous with "confiscatory." *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 When rate "unreasonable, unjust, oppressive and unlawful," as against carrier. *Railroad Co. v. Utilities Commission*, 95 K. 604.  
 Jurisdiction of Commission not obtained by suit in Montgomery county. *The State, ex rel., v. Flannelly*, 96 K. 372.  
 Courts have no power to fix rates. *Telephone Co. v. Utilities Commission*, 97 K. 136.  
 Rates insufficient to pay for service; power of courts; injunction. *Telephone Co. v. Utilities Commission*, 97 K. 137.  
 Rate declared confiscatory; establishment of rate until Utilities Commission acts. *Telephone Co. v. Utilities Commission*, 97 K. 136.

**Units of Measurement.** The commission may ascertain and prescribe for each kind of public utility governed by the provisions of this act, suitable and convenient standard commercial units of products in service. These shall be the lawful units for the purpose of this act. It shall prescribe reasonable regulations for examinations and testing of such products or service and for the measurement thereof. It shall establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto. (Sec. 8349, G. S. 1915; sec. 22, ch. 238, Laws 1911.)

**Reports to the Commission.** Each public utility governed by the provisions of this act shall furnish to the commission, in such form and at such time as the commission shall require, such accounts, reports and information as shown in itemized detail: (1) The depreciation per unit; (2) the salaries and wages, separately, per unit; (3) legal expenses per unit; (4) taxes and rentals, separately, per unit; (5) the quantity and value of material used per unit; (6) the receipt from residuals, by-products, services or other sales, separately, per unit; (7) the total and net cost per unit; (8) the gross and net profit per unit; (9) the dividends and interest per unit; (10) surplus or reserve per unit; (11) the price per unit paid by consumers; and, in addition, such other items, whether of a nature similar to those hereinbefore enumerated or otherwise, as the commission may prescribe in order to show completely and in detail

either the operation of the public utility or common carrier in furnishing the unit of its product or service to the public. (Sec. 8350, G. S. 1915; sec. 23, ch. 238, Laws 1911.)

**Annual Reports to Commission.** That section 24 of chapter 238 of the Laws of 1911, being section 8351 of the General Statutes of 1915, is hereby amended so as to read as follows: Sec. 24. Every public utility and common carrier governed by the provisions of this act, when, and as required by the Public Utilities Commission, shall file with the Public Utilities Commission an annual report and such monthly or other regular reports, or special reports, and such other information as the Public Utilities Commission may require. The forms of such reports shall follow as nearly as possible the forms prescribed by the Interstate Commerce Commission. When required by the Public Utilities Commission such reports and information shall be certified under oath by a duly authorized officer having knowledge of the matters therein contained. The Public Utilities Commission may at any time require from any public utility or common carrier specific answers to any questions upon which it may desire information in connection with matters pending before them. The Public Utilities Commission may, in its discretion, grant extensions of the time within which reports and information are required to be filed. Annual reports, however, shall be filed within two months after the close of the fiscal year as fixed by the Public Utilities Commission, and any extensions of such period shall not exceed in the aggregate sixty days. The forms of reports of the common carriers and the public utilities which report to the Interstate Commerce Commission shall, as nearly as possible, follow the form prescribed by the Interstate Commerce Commission. (Sec. 1, ch. 254, L. 1917.)

All acts and parts of acts in conflict herewith are hereby repealed. Sec. 2, ch. 254, L. 1917.)

**Declaration of State Power.** The power to create liens on corporate property situated within the state of Kansas by companies transacting the business of common carriers, as defined in the laws of this state, and public utilities governed by the provisions of this act in this state is a special privilege, the right of supervision, regulation, restriction and control of which shall be vested in the state, and such power shall be exercised according to law, and the provisions of this act shall apply to all companies organized under the laws of other states of the Union and of foreign countries, as well as to domestic corporations, transacting business in this state as a common carrier or as a public utility governed by the provisions of this act. (Sec. 8352, G. S. 1915; sec. 24a, ch. 238, Laws of 1911.)

**Issuing Stocks and Bonds.** A public utility or common carrier may issue stock, certificates, bonds, notes or other evidences of indebtedness, payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, for the purpose of carrying out its corporate powers, the construction, completion, extension or improvements of its facilities, or for the improvements or maintenance of its service, or for the discharge of lawful refunding of

its obligations, or for such other purposes as may be authorized by law; provided, and not otherwise, that there shall have been secured from the commission a certificate stating the amount, character, purposes and terms on which such stocks, certificates, bonds, notes or other evidences of indebtedness are proposed to be issued, as set out in the application for such certificate, and that the statements contained in such application have been ascertained to be true, but this provision shall not apply to any lawful issue of stock, the lawful execution and delivery of any mortgage, or to the lawful issue of any bonds thereunder which shall have been duly approved by the Board of Railroad Commissioners prior to the taking effect of this act. The proceedings for obtaining such certificate from the commission and the conditions of its being issued by said board shall be as follows: (a) In case the stocks, certificates, bonds, notes or other evidences of indebtedness are to be issued for money only, the public utility or common carrier shall file with the commission a statement, signed and verified by the president or other chief officer of the company having knowledge of the facts, showing (1) the amount and character of the proposed stocks, certificates, bonds, notes or other evidences of indebtedness; (2) the general purposes for which they are to be issued; (3) the terms on which they are to be issued; (4) the total assets and liabilities of the public utility or common carrier; and (5) that the capital sought to be secured by the issuance of such stocks, certificates, bonds, notes or other evidences of indebtedness is necessary and required for such purposes and will be issued therefor. (b) In case the stocks, certificates, bonds, notes or other evidences of indebtedness are to be issued partly or wholly for property or services or other consideration than money, the public utility or common carrier shall file with the commission a statement, signed and verified by the president or other chief officer having knowledge of the facts, showing (1) the amount and character of the stocks, certificates, bonds, notes or other evidences of indebtedness proposed to be issued; (2) the general purposes for which they are to be issued; (3) a general description and an estimated value of the property or services for which they are to be issued; (4) the terms on which they are to be issued or exchanged; (5) the amount of money, if any, to be received for the same in addition to such property, services or other consideration; (6) the total assets and liabilities of the public utility or common carrier; and (7) that the capital sought to be secured by the issuance of such stocks, certificates, bonds, notes or other evidences of indebtedness is necessary and required for such purposes and will be used therefor. The commission may also require the public utility or common carrier to furnish such further statements of facts as may be reasonable and pertinent to the inquiry, and shall have full power to ascertain the truth of all statements made by such common carrier or public utility. Upon full compliance by the applicant with the provisions of this section the commission shall forthwith issue a certificate stating the amount, character, purposes and terms upon which such stocks, certificates, bonds, notes or other evidences of indebtedness are proposed to be issued, as set out in the application for such certificate, and that the statements contained in such application have been ascertained to be



true. Any issue of stocks, certificates, bonds, notes or other evidences of indebtedness not payable within one year, which shall be issued by such public utility or common carrier contrary to the provisions of this act shall be void. (Sec. 8353, G. S. 1915; sec. 25, ch. 238, Laws 1911.)

The following cases discuss the authority of the state to supervise the issuance of securities: 203 N. Y. 299; 197 N. Y. 1; 203 N. Y. 789; 92 N. E. 1096; 122 N. Y. 641; 1916 C. P. U. R. 42; 60 L. Ed. 334; 1916 C. P. U. R. 705, Annotated; P. U. R. 1916 D, 235, Annotated; 23 L. Ed. 952.

**Penalties for Issuing Stock.** Any common carrier or public utility governed by the provisions of this act, or any agent, director or officer thereof, who shall, directly or indirectly, issue or cause to be issued any stock, certificate of stock, bonds, or other evidences of indebtedness contrary to the provisions of this act, or who shall apply to the proceeds from the sale thereof to any purpose other than that specified in the certificate of the commission, as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred dollars and not more than five thousand dollars, or by imprisonment in the county jail not more than one year, or by both such fine and imprisonment. (Sec. 8354, G. S. 1915; sec. 26, ch. 238, Laws 1911.)

**Prohibitions on Carriers and Utilities.** No common carrier or public utility governed by the provisions of this act, domestic or foreign, shall hereafter purchase or acquire, take or hold any part of the capital stock, bonds or other forms of indebtedness of any competing public utility or common carrier, either as owner or pledgee, unless authorized by the commission. Any common carrier engaged in intrastate commerce in this state is prohibited in the transportation of such commerce, articles or commodities under the following circumstances and conditions: (a) when the article or commodity has been manufactured, mined or produced by a carrier or under its authority and at the time of the transportation the carrier has not in good faith, before the act of transportation, disassociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or part; (c) when the common carrier at the time of transportation has a legal or equitable interest, directly or indirectly, in the article or commodity, except materials and supplies for its own use. Every public utility is prohibited from engaging in any business in this state which is not in conformity with its charter or in which it is not permitted to engage under the laws of the state of Kansas; provided, that this section shall not apply to ownership by railroads of the stock, bonds, or other forms of indebtedness of union depot or terminal railroad properties used in common by two or more such railroads. (Sec. 8355, G. S. 1915; sec. 27, ch. 238, Laws 1911.)

**Valuation of Property.** Said commission shall have the power and it shall be its duty to ascertain the reasonable value of all property of any common carrier or public utility governed by the provisions of this act used or required to be used in its services to the public within the state of Kansas, whenever it deems the ascertainment of such value necessary in order to enable the commission to fix fair and reasonable rates, joint rates, tolls and charges, and in making such valuations they may avail



themselves of any reports, records or other things available to them in the office of any national, state or municipal officer or board. (Sec. 8356, G. S. 1915; sec. 28, ch. 238, Laws 1911.)

**Examination of Accounts.** The commission shall have authority to examine and audit all accounts, and all items shall be allocated to the accounts prescribed by the commission. The agents, accountants or examiners employed by the commission shall have authority under the direction of the commission to inspect and examine any and all books, accounts, papers, records, property and memoranda kept by such public utilities and common carriers. The account shall be closed annually on the 30th day of June, and a balance sheet of that date promptly taken therefrom. (Sec. 8357, G. S. 1915; sec. 29, ch. 238, Laws 1911.)

**Rates of January 1, 1911, to be Rate.** Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911. (Sec. 8358, G. S. 1915; sec. 30, ch. 238, Laws 1911.)

Telephone rates prescribed in ordinance remain effective until action taken. *City of Emporia v. Telephone Co.*, 88 K. 443.  
Refusal of Commission to grant increase; power of courts; injunction. *Telephone Co. v. Utilities Commission*, 97 K. 136.

**Public Utilities Certificate.** No common carrier or public utility governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the Public Utilities Commission that public convenience will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state. This section shall not apply to any common carrier or public utility governed by the provisions of this act now transacting business in this state. (Sec. 8359, G. S. 1915; sec. 31, ch. 238, Laws 1911.)

Provisions of section not applicable to city electric light plant. *Humphrey v. City of Pratt*, 93 K. 413.  
Injunction for want of license not maintainable by rival company. *Telephone Co. v. Telephone Association*, 94 K. 159.

**Report Concerning Accidents.** Every common carrier and every public utility governed by the provisions of this act shall, whenever an accident attended with loss of human life or serious personal injury occurs upon its premises within this state, give immediate notice thereof by telegraph to the commission. In the event of any such accident, the commission, if it deem the public interest requires it, shall cause an investigation to be made forthwith, in connection with the Labor Commission, as now provided by law, which investigation shall be held in the locality of the accident, unless for greater convenience of those concerned it shall order such investigation to be held at some other place. Said investigation may be adjourned from place to place as may be found necessary and convenient. The commission shall seasonably notify an officer or agent of the public utility or common carrier of the time and place of the investigation. (Sec. 8360, G. S. 1915; sec. 32, ch. 238, Laws 1911.)

**Cities' Control of Utilities.** Every municipal council or commission shall have the power and authority, subject to any law in force at the time, to contract with any public utility or common carrier, situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, by ordinance or resolution, duly considered and regularly adopted: (1) As to the quality and character of each kind of product or service to be furnished or rendered by any public utility or common carrier, and the maximum rates and charges to be paid therefor to the public utility or common carrier furnishing such product or service within said municipality, and the terms and conditions, not inconsistent with this act or any law in force at the time under which such public utility or common carrier may be permitted to occupy the streets, highways or other public property within such municipality, (2) To require and permit any public utility or common carrier to make such additions or extensions to its physical plant as may be reasonable and necessary for the benefit of the public, and may designate the location and nature of such additions and extensions at the time within which such shall be completed, and the terms and conditions under which the same shall be constructed. (3) To provide a reasonable and lawful penalty for the noncompliance with the provisions of any ordinance or resolution adopted in pursuance with the provisions hereof; provided, however, that no ordinance or resolution granting or extending any right, privilege or franchise shall be in force or effect until thirty days after the same shall have been duly published; nor if any complaint be made, as hereinafter provided for, shall said ordinance or resolution be in effect while any proceedings to review before said commission or action or appeal in any court in relation thereto shall be pending. Upon any complaint being made, within fifteen days after the publication of any such ordinance or resolution, to the Public Utilities Commission by any such public utility or common carrier, or by ten or more taxpayers of any such municipality a bond to pay the costs of the hearing having first been filed by the complainant with and approved by the said commission, that any right, privilege or franchise granted, or ordinance or resolution or part of any ordinance or resolution adopted, by any municipal council or commission is unreasonable, or against public policy, or detrimental to the best interests of the city, or contrary to any provisions of law, the Public Utility Commission shall set a date for the hearing of such complaint, not less than ten days after date of filing thereof, and shall cite the parties interested to appear on a date named, which date shall be not less than ten days after the fixing of the date of the hearing, and on that date, or a time agreed upon by the interested parties, or a date fixed by the Public Utility Commission, the complainant shall present such evidence as they or it may have in support thereof, and show why such complaint should be sustained, and the Public Utility Commission may inquire into the allegations in such complaint, and may subpoena witnesses, and take testimony to ascertain the truth of the allegations contained therein in contemplation of bringing an action as hereinafter provided; and if said commission shall find that any provision of any such ordinance or resolution is unreasonable, or against the public welfare or public interest,

or has reason to believe that the same may be contrary to law, said Public Utilities Commission shall, within ten days, advise and recommend such changes in the ordinance or resolution as may be necessary to meet the objections set forth in the complaint and protect the public interest, and to remove any unreasonable provision therefrom; and if such municipal council or commission shall not within twenty days thereafter amend such ordinance or resolution to conform to the recommendations of said Public Utilities Commission, the Public Utilities Commission may, in the name of the state of Kansas, within thirty days after such finding, commence proceedings against such municipal council or commission and common carrier or public utility governed by the provisions of this act in any court of competent jurisdiction, to set aside any ordinance or resolution, or part thereof, because of its unreasonableness or illegality, or because the same is not for the promotion of the welfare and best interests of said municipality, which action and proceedings shall be in conformity with the provisions of this act. (Sec. 8361, G. S. 1915; sec. 33, ch. 238, Laws 1911.)

*Power of city to contract with public utility, considered. City of Emporia v. Telephone Co., 90 K. 118.*  
*Referendum of cities of second class not amended or repealed. Humphrey v. City of Pratt, 93 K. 413.*

**Obligations Not be Incurred Without Certificate.** No common carrier or public utility governed by the provisions of this act shall issue any stock, certificates, bonds, notes or other evidences of indebtedness, for money, property or services, either directly or indirectly, nor shall it receive any money, property or services in payment of the same either directly or indirectly until there shall have been recorded upon the books of such corporation the certificate of the commission herein provided for. (Sec. 8362, G. S. 1915; sec. 34, ch. 238, Laws 1911.)

**Stock, Dividends, etc.** No common carrier or public utility governed by the provisions of this act shall declare any stock, bond or scrip dividend or divide the proceeds of the same of any stocks, bond or scrip among its stockholders unless authorized by the commission so to do. (Sec. 8363, G. S. 1915; sec. 35, ch. 238, Laws 1911.)

**Assignment, etc., of Franchise.** No franchise granted to a common carrier or public utility governed by the provisions of this act shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or right thereunder be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the commission. (Sec. 8364, G. S. 1915; sec. 36, ch. 238, Laws 1911.)

**Falsifying Books, Records, etc.** Any person who shall willfully make any false entry in the accounts, books of account, records, or memoranda kept by any common carrier or any public utility governed by the provisions of this act, or who shall willfully destroy, mutilate, alter or by any other means or device falsify the record of any such account, book of accounts, record or memorandum, or who shall willfully neglect or fail to make full, true and correct entries of such account, book of accounts, record or memorandum of all facts and transactions apper-

taining to such common carriers or public utilities business, or who shall falsely make any statement required to be made to the Public Utilities Commission, shall be deemed guilty of a felony, and upon conviction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment of not less than one year nor more than three years, or by both such fine and imprisonment; provided, that the commission may in its discretion issue orders specifying such operating, accounting or financial papers, records, books, blanks tickets, stubs or documents, of carriers which may after a reasonable time be destroyed, and prescribing a length of time such books, papers, or documents shall be preserved; and provided further, that such orders shall be in harmony with those of the Interstate Commerce Commission. (Sec. 8365, G. S. 1915; sec. 37, ch. 238, Laws 1911.)

**Penal Provisions.** If any common carrier or public utility governed by the provisions of this act shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it in this act, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commissioners, or any final judgment or decree made by any court upon appeal from any order of the commissioners, it shall, for every such violation, failure or refusal, forfeit and pay to the support of the common schools a sum not less than one hundred dollars and not more than one thousand dollars for such offense. Such forfeiture shall be enforced and collected by the attorney-general in any court of competent jurisdiction. In construing and enforcing the provisions of this act, any act, omission or failure of any officer, agent or other person acting for or employed by any such public utility or common carrier while acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such public utility or common carrier, and every day during which any such public utility or common carrier or officer, agent or employee thereof, shall fail to comply with any order or direction of the commissioner, or to perform any duty required or enjoined by this act, shall constitute a separate and distinct violation of the provisions of this act. (Sec. 8366, G. S. 1915; sec. 38, ch. 238, Laws 1911.)

**How Commission Shall Enforce Orders.** The commission may compel compliance with the provisions of this act and compel compliance with the orders of the commission by proceeding in mandamus, injunction or other appropriate civil remedies, or by appropriate criminal proceedings in any court of competent jurisdiction. (Sec. 8367, G. S. 1915; sec. 39, ch. 238, Laws 1911.)

Section empowers Commission to compel compliance with its orders. City of Emporia v. Telephone Co., 90 K. 127.  
Enforcement of orders of Utilities Commission; when mandamus will lie. The State, ex rel., v. Flannelly, 96 K. 372.

**Statute Cumulative.** The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state relating to common carriers and public utilities, and shall not repeal any other remedies or rights now existing in this state for the enforcement of the duties and obligations of public utilities and common carriers or the

rights of the Public Utilities Commission to regulate and control the same except where inconsistent with the provisions of this act. (Sec. 8368, G. S. 1915; sec. 40, ch. 238, Laws 1911.)

Rights and remedies given by act construed as cumulative. *City of Emporia v. Telephone Co.*, 90 K. 127.

**Rule for Construing Statute.** The provisions of this act and all grants of power, authority and jurisdiction herein made to the commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the commissioners. (Sec. 8369, G. S. 1915; sec. 41, ch. 238, Laws 1911.)

Act to be liberally construed; powers granted by act. *The State, ex rel., v. Postal Telegraph Co.*, 96 K. 298.

**Pending Actions and Proceedings.** Nothing in this act shall affect pending actions or proceedings brought by or against the Board of Railroad commissioners of this state, but the same may be prosecuted or defended by, and in the name of the commission hereby created. Any investigation, examination, or proceeding undertaken, commenced or instituted by the said Board of Railroad Commissioners prior to the taking effect of this act may be conducted and continued to a final determination by the commission hereby created, under the same terms and conditions and with like effect as though such Board of Railroad Commissioners had not been abolished. (Sec. 8370, G. S. 1915; sec. 42, ch. 238, Laws 1911.)

**Proceedings Before Interstate Commerce Commission.** If any interstate rate, joint rate, fare, toll, charge, rule or regulation, classification or schedule of rates, joint rates, fares or tolls, is found to be unjust, unreasonable, excessive, unjustly discriminatory, or unduly preferential, or in violation of the interstate commerce law, or in conflict with the rules, orders or regulations of the Interstate Commerce Commission, the Public Utilities Commission may apply by petition or other proper method to the Interstate Commerce Commission for relief. (Sec. 8371, G. S. 1915; sec. 43, ch. 238, Laws 1911.)

**Statute Repealed.** That original sections 7063, 7064, 7065 and 7066 of the General Statutes of Kansas of 1909 be and the same are hereby repealed. (Sec. 8372, G. S. 1915; sec. 43a, ch. 238, Laws 1911.)





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1918.

**No. 277.**

The Public Utilities Commission of the State of Kansas  
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural Gas  
Company et al.

**No. 329.**

Kansas City, Missouri; The Public Service Commission  
of the State of Missouri et al., *Appellants*,

vs.

John M. Landon, Receiver of the Kansas Natural  
Gas Company et al.

**No. 330.**

Kansas City Gas Company, The Wyandotte County Gas  
Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and  
George F. Sharitt, Receivers, and Fidelity Title  
and Trust Company.

**No. 353.**

The Public Utilities Commission of the State of Kansas  
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural  
Gas Company et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF KANSAS.

**REPLY BRIEF OF KANSAS CITY, MISSOURI.**

Many interesting questions are presented in the various briefs in these causes but the underlying elemental



problem upon which all of this litigation rests seems to have passed practically into a total eclipse. That problem is: How shall the people of the various communities get relief from their suffering from an insufficient supply of gas? In a most praiseworthy attempt to render assistance in the solution of that problem we believe that the District Court has either gone too far in its decree or it has not gone far enough. That court, in its anxiety to solve the problem, has either overstepped fixed principles of law by which it was bound in considering rights fixed by contracts, or, if it had the power to brush aside those contracts on some broad equitable principle of public necessity, it has failed to exercise that power comprehensively in the protection and preservation of the equities of all the parties in interest.

### **Did the Court Below Overstep Its Powers?**

In order to present our answer to this question, we want to restate certain general facts in the case.

Prior to September 27, 1906, a private corporation furnished artificial gas to the people of Kansas City, Missouri, by means of a production plant and a distribution system (and the same is true as to most or all of the other cities interested in this controversy). In 1906, after protracted negotiation, an agreement was made between Kansas City, Mo., and McGowan, Small & Morgan for the furnishing of natural gas to Kansas City, Missouri. This agreement was in the form of a franchise ordinance. (The grantees in said franchise were McGowan, Small & Morgan. They have since assigned

their rights and interests to the Kansas City Gas Company, and, in the interest of simplicity of statement, we shall designate the grantees in said franchise as the Kansas City Gas Company). The grantees in said franchise took over the plant of the former company and agreed to furnish natural gas to the people of Kansas City, Missouri, at the rates therein stated, thirty cents per thousand feet being the highest rate fixed. Such a contract is within the powers of Kansas City. (*Detroit, etc., Ry. v. Michigan*, 242 U. S. 238; *Aurora Water Co. v. Aurora*, 129 Mo. 540; *State ex rel. National, etc., Co. v. St. Louis*, 145 Mo. 551; K. C. Charter, 1889, Art. 3, Sec. 1, Clauses 7, 28; Art. 14, Secs. 1, 12.) The Supreme Court of Missouri has held that the rates fixed by such a contract may be modified by the Public Service Commission, under the police powers of the state (*State v. Public Service Commission*, 204 S. W. 497), but it has not held that until so modified the contract is not binding. Kansas City was paying this contract price until it was modified by the court below, July 31, 1917. It was further provided in that franchise agreement that when it should be ascertained, according to the terms of that franchise, that the supply of natural gas was insufficient, the grantees should furnish artificial gas at a price to be fixed in the manner specified in that franchise. To enable said grantees to comply with the obligations of their franchise they made a contract with a natural gas company to furnish gas to them on terms fixed in that contract. (Subsequently other parties became interested in this contract, but for simplicity of statement, we shall

refer to them all as the Kansas Natural Gas Company). There was no contractual relationship between Kansas City, Missouri, and the Kansas Natural Gas Company. In 1912, the State of Kansas sued the Kansas Natural Gas Company in the District Court of Montgomery County, Kansas, charging its violation of the anti-trust laws of Kansas, and on February 15, 1913, that company was adjudged guilty, and the court appointed receivers to take charge of and manage its business. (Eventually, John M. Landon became the sole surviving receiver, and for simplicity we shall state the facts as though he had been the only receiver.) When a receiver is appointed to take over property in litigation there are sometimes executory contracts affecting the business in his hands. In such cases the receiver may continue in the performance of such contracts, temporarily, until he can determine whether it is to the best interests of the estate in his hands to adopt or reject such contracts. The receiver in this case took over and performed the contract between the Kansas Natural Gas Company and McGowan, Small & Morgan, or their successor, the Kansas City Gas Company, as well as all other contracts between the Kansas Natural Gas Company and other distributing companies, until April, 1915, when various proceedings were instituted by him in Kansas tribunals to procure an increase in rates in Kansas. Being unable in those proceedings to procure as large an increase as he desired, the receiver brought this action. One of his claims in this action was that in figuring the rate of return on investment the Kansas Public Utilities Commission did not

make any allowance for going value or any value of the property for the cost of attaching the business. His business had no going value or attached business except that covered by the contracts he now claims are not binding upon him. In such circumstances we are unable to see how there is any room for contending that the receiver was merely temporarily investigating to see whether he would adopt or reject the contract between the Kansas Natural Gas Company and the Kansas City Gas Company. Two years is not a reasonable time for such investigation. And when he has in fact adopted the contract, neither the court appointing him nor any other court can re-cast his contractual obligations by its *ex parte* declaration that he is not to be deemed to have adopted the contract, and thereby nullify its actual adoption.

So far as concerns the contract between the Kansas Natural Gas Company and McGowan, Small & Morgan, no condition arose that would bring its legality into question; and in any event the beneficiary of that contract is in no position to question its legality. (*St. Louis v. St. Louis, etc., Co.*, 248 Mo. 10, 27.)

Much is said in the various briefs on the question of whether or not gas that is being delivered by a distributing company to the gas consumer is an article of interstate commerce because it is flowing from one state to another. In our view of the case we never come to that question. Contracts are binding whether they affect interstate or intrastate commerce. But the contention that the fixing of the price at which gas shall be furnished

by the Kansas City Gas Company, to the gas consumers in Kansas City, by a state public utilities commission, is an interference with interstate commerce, is, in our opinion, based on a misconception of the principles by which interstate commerce questions are governed. In every case it is the nature of the business that determines whether any particular act or transaction is or is not interstate commerce. Counsel for the receiver assumes that the receiver is selling and delivering gas to the consumer in Kansas City, Missouri, and that the Kansas City Gas Company is a mere intervening collection agency. An examination of the contract between Kansas City and McGowan, Small and Morgan, and of the contract between McGowan, Small & Morgan and the Kansas City Pipe Line Company, predecessor of the Kansas Natural Gas Company, will show that Kansas City and its citizens are dealing with McGowan, Small & Morgan, or their successors, the Kansas City Gas Company, and not with the Kansas Natural Gas Company. No one would contend for a moment that if the Kansas City Gas Company should wrongfully cut off the supply of gas to a consumer in Kansas City, Missouri, that consumer would have any action for damages against the receiver or the Kansas Natural Gas Company. Nor could one contend that if a gas consumer should refuse to pay his gas bill the receiver or the Kansas Natural Gas Company could maintain a suit against him to compel its payment.

One of the authorities cited by the receiver (*Southern Pac. etc. Co. v. Interstate Commerce Commission*, 219 U. S. 498), illustrates the true rule applicable here.

A wharf is a local object which cannot move from one state to another. But if it is on the border of a state and is used principally for the moving of traffic across that border, it is on that account essentially a channel of interstate commerce and its use is subject to federal regulation on that account. In another illustrative case (*Western Union Tel. Co. v. Foster*, 38 S. C. R. 438), a telegraph Company and its agents were engaged in interstate commerce when they collected information in one state and conveyed it to their patrons in another state, they knowing at the beginning of the transaction that that very information was going to those very patrons. But the furnishing of gas by a local gas company to the people of a city in which said gas company does its entire business under a franchise contract with such city, is purely a local transaction, and this is equally true whether the local gas company makes or procures its gas at home, or gets it from a producer in another state. The distributing company's business is to furnish gas, regardless of its source, and to furnish a sufficient amount of such gas, and at a sufficient pressure to make it of use. But for an accident of nature, it was entirely within the range of possibility that the Kansas Natural Gas Company might supply the Kansas City Gas Company with gas from wells in Missouri for one day or for one year, and from wells in Kansas for the next day or the next year. In such event, would the right of control of the business of the latter company rest in a State Public Service Commission during such day or such year and pass to a federal commission when the Missouri

well was closed and the Kansas well was opened? A gas franchise between a city and a local company for local service, is, in a sense, an institution of the local government (*Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 408), and, of necessity, must be subject to local control. The city or some other power capable of exercising such local control must have the right to say when and where new mains must be laid to supply newly settled or settling districts, when and where old mains must be repaired, where street lights must be placed; and to supervise the quality and equality of the service and the price to be paid therefor. A hypothetical case will illustrate the point we are making: The contract in this case runs for a period of thirty years. If the receiver or his successor is still piping natural gas from another state to Kansas City, Missouri, after the franchise and its limitations and burdens have expired, could it be seriously contended that the receiver or his successor would have the right to continue so to do, and that the city and the State then would be powerless to demand a new contract or to impose any limitations or burdens upon the receiver or his successor, or exercise any control or supervision over the service, because such action would constitute an interference with interstate commerce? Or, suppose Kansas City, aggrieved at the failure of the Kansas City Gas Company to furnish proper service, should sue to forfeit its franchise, or should appeal to the Missouri Public Service Commission to order the company to discontinue trying to furnish natural gas, and to begin furnishing artificial gas,



according to the terms of the franchise, would it be held that no order could be made, and that Kansas City must be abandoned to its fate, because to make such an order would be an interference with interstate commerce?

In its decree, the court below ruled that the contract between the Kansas Natural Gas Company and McGowan, Small & Morgan (whose interests have been assigned to the Kansas City Gas Company) was not binding upon the receiver, and that the receiver was entitled to charge the Kansas City Gas Company a price in excess of that fixed by its contract with the Kansas Natural Gas Company. In order to enable the Kansas City Gas Company to pay the new price fixed by the court below, the court in a proceeding in Kansas on process served on Kansas City, Missouri, in Missouri, abrogated the contract between Kansas City and the Kansas City Gas Company to which the receiver was not a party; and the court below in its decree enjoined Kansas City from interfering with the collection of the rate thus fixed in said order. The court in its decree further ruled that the furnishing of gas by the Kansas City Gas Company to the consumers of Kansas City, Missouri, was a transaction involving interstate commerce and therefore beyond the control of the public service commission of Missouri.

On the facts as stated above, we believe the court has overstepped its powers in attempting to assume jurisdiction over Kansas City in a suit instituted in the Federal Court of Kansas, the purpose of which suit, so far as Kansas City is concerned, being to abrogate a con-

tract between Kansas City, Missouri, and the Kansas City Gas Company, to which contract the receiver is not a party. We believe that the court has overstepped its powers in abrogating the contract between the Kansas Natural Gas Company and McGowan, Small & Morgan (and their successors the Kansas City Gas Company) when that contract had been adopted and the business covered by it is still being carried on by the receiver. We believe that the court has overstepped its powers in abrogating the contract between Kansas City, Missouri, and McGowan, Small & Morgan (and their successors the Kansas City Gas Company) against the objections of both of the parties to that contract, at the suit of the receiver and the Kansas Natural Gas Company, neither of whom is now or ever has been a party to such contract.

**Did the court below go far enough in its decree?**

If the court below had the power to abrogate the contract between the Kansas City Gas Company and the Kansas Natural Gas Company and the contract between Kansas City and the Kansas City Gas Company, then it has not gone far enough in disposing of the problems involved.

If the Kansas Natural Gas Company was legally obligated to perform the service now being performed by the receiver, and by its breach of its obligation the Kansas City Gas Company has been compelled to pay a greater amount for the gas which it received and has thereby lost money, the Kansas City Gas Company has a legal claim against the Kansas Natural Gas Company.

And, if the Kansas City Gas Company is saving itself from loss by collecting an increased price from the Kansas City consumers, those consumers have legal claim against the Kansas City Gas Company for the amount which they are losing by reason of the compulsory payment of the excess charge, and they are entitled to reimbursement therefor. The property and moneys in the hands of the receiver should be preserved for the payment of these claims. As a matter of fact, the receiver has been paying off the financial obligations of the Kansas Natural Gas Company; that is, the receiver is performing the contracts of the Kansas Natural Gas Company so far as the bondholders of that company are concerned, but is ignoring the contracts of that company so far as the people are concerned. And the receiver is so conducting the business that the Kansas Natural Gas Company or the purchaser of its capital stock will have preserved for its or his benefit the surplus assets in the hands of the receiver. A speculative estimate has been made by the court that the supply of gas will be exhausted within five or six years from the date of the decree and the rates have been fixed so as to pay out from such rates the total value of the plant within that time. In such circumstances, the plant should become the property of the consumers who have paid for the same out of such excess rates, or be held in trust for their benefit. The decree makes no such provision. If, at the end of the estimated time, there is still a supply of gas, and the plant is still useful, the Kansas Natural Gas Company or its successor in interest will own this plant, paid for

by the gas consumers and the gas consumer will have no interest in it.

Again, if the court below had power to work out the gas problem without regard to contractual obligations, it should have taken over the problem in its entirety and worked it out entirely. The need of the people, and of all of them, is for a sufficient supply of gas at all times. Furnishing an insufficient amount of gas all the time, or a sufficient amount of gas only a part of the time, works a most cruel hardship on the communities supplied. Natural gas, when supplied, is more economical than artificial gas. It has been arranged in at least one city and can undoubtedly be arranged in Kansas City, Missouri, to eke out with artificial gas the supply of natural gas when necessary. All communities must eventually come to artificial gas. But it is extravagance not to use the natural gas so long as it can be used practically. Cities should not be made unnecessarily to give up the natural gas. If the court had authority to make a new contract for the receiver and a new contract for Kansas City, Missouri, and the Kansas City Gas Company, then in the exercise of that power it should compel the Kansas City Gas Company to provide for a sufficient supply of gas at all times and to reform its plant so that when there is not a sufficiency of natural gas, it can supply the people of Kansas City with artificial gas.

**If the receiver is compelled to comply with the contracts of the Kansas Natural Gas Company, can he continue to do business?**

It is claimed that there is not enough gas to enable the receiver to perform the contracts of the Kansas Natural Gas Company unless his mains are extended to new wells and that he cannot make such extensions without money to pay for such extensions, and therefore the contract price will result in no gas at all.

We appreciate the difficulties of the present situation from the receiver's viewpoint. But either the gas-producer and transporter or the gas-distributor, has utterly failed to meet the situation so far as the rights of Kansas City are concerned. The conditions are intolerable. They must be corrected. We doubt whether such correction can be brought about in litigation in a court of law or in a court of equity. We believe that the correction must depend upon some plan wisely made protecting all interests and not unfairly generous to the wrongdoing gas-producer and the indifferent gas-distributor, at the expense of the long-suffering gas-consumer. And if the communities affected are to give away their rights which they possess under former contracts, to procure new agreements, those new agreements must be subscribed by parties who have not sacrificed the confidence of the people, or be put under the supervision of some commission which can supervise the performance of that agreement. In the meantime, because of the overruling necessity that the great numbers of people now dependent on

natural gas must be taken care of in the best manner possible with the limited means available, the receiver must continue temporarily to supply the demand until such a plan can be worked out. (*Seattle etc. Co. v. Snoqualmie etc. Co.*, 40 Wash. 380, 82 Pac. 713.)

Quite aside from the immediate effect of the decision in this case upon its present gas problem, Kansas City is vitally interested in the decision of this case because of the precedent it will establish with reference to its contracts with owners of other public utilities.

It has been held in several cases that where the price of service is fixed by legislative enactment it may be changed by legislative enactment. But it has been held in several cases that where the price is fixed by contract between parties competent to contract, the price cannot be changed otherwise than by mutual consent. (*Quinby v. Public Service Commission* (N. Y.), 119 N. E. 433; *Re Third Ave. R. Co.*, N. Y. Pub. Serv. Com., First Dist., June 6, 1918, P. U. R. 1918 E. 100; *Interurban Ry. & Terminal Co. v. Public Utilities Commission of Ohio*, decided by Ohio Supreme Court, June 21, 1918; *State ex rel. Tacoma etc. Co. v. Public Service Commission* (Wash.), 172 Pac. 890; *Columbus Ry. etc. Co. v. City of Columbus*, decided by Judge Westenhaver, of the Southern District of Ohio, September 20, 1918.) And we do not believe that this court has ever held that a contract between a public utility owner and a city can be changed, against the interest of the public, merely to enable the owner of the utility to comply more easily with its contracts with its bondholders. If franchise

agreements are subject to modification whenever the burden becomes unpleasant for either of the parties to the contract, a franchise amounts to a mere temporary prima facie working agreement and the obligations of the parties to that contract vacillate according to the views of the last tribunal appealed to for its modification. Such a holding would make franchise agreements, reached after long and careful negotiations, valueless scraps of paper. It has always been a part of our national and individual religion, that contracts must be respected. Is it a wholesome thing to break down the traditions of our fathers, to sow broadcast among non-understanding people, the new doctrine that an eight per cent return is paramount to one's word of honor?

We respectfully urge that the judgment in this case be reversed and that the cause be dismissed as to this appellant.

Respectfully submitted,

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The Cities of St. Joseph and Joplin concur in what is here said.

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1918.

No. 277.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.,  
*Appellants,*

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*Appeals from the District Court of the United States for the  
District of Kansas.*

**STATEMENT AND BRIEF OF THE CITIES OF  
KANSAS CITY, JOPLIN AND ST. JOSEPH,  
MISSOURI, APPELLANTS IN  
No. 329.**

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*Appeals from the District Court of the United States for the  
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**STATEMENT OF FACTS.**

The facts contained in the following statement of facts will be found in the STATEMENT OF THE EVIDENCE (Record, pp. 777 *et fol.*) except as referred to other portions of the Record.

The Kansas City Gas Company does business in Kansas City, Missouri, and sells natural gas to

the gas consumers of that city under a franchise contract entered into with the City of Kansas City. The Kansas City Gas Company buys all its gas from the Kansas Natural Gas Company (or its receiver John M. Landon), with which company it has a contract for the purchase of gas and said gas is delivered to the Kansas City Gas Company within the State of Missouri. Neither the City of Kansas City, Missouri, nor any gas consumers there have any contract or dealings with the Kansas Natural Gas Company or its receiver. The franchise contract (approved Sept. 27, 1906) provides for a rate of 25 cents for the first five years, 27 cents for the next five years and thirty cents thereafter. In 1916, therefore, the rate was to be raised to 30 cents; the laws of Missouri of 1913 having established a Public Service Commission, the Kansas City Gas Company filed with that Commission the franchise rate of 30 cents before putting it in effect. The consent of the City of Kansas City was entered before the Commission and the Commission made a formal order approving the rate. This rate then went into effect in November, 1916.

John M. Landon, in December, 1915, when this suit was brought, was the receiver appointed by the District Court of Montgomery County, Kansas, for the property of the Kansas Natural Gas Company. The Public Utility Commission of Kansas had established a rate to be paid by consumers in Kansas for natural gas. The receiver brought this suit (No. 136-N) in this court against the Public Utilities Commission of Kansas, the Public Service Commission of Missouri, against

all the distributing companies of Kansas and Missouri who bought natural gas from the Kansas Natural Gas Company and against all the cities of Kansas and Missouri (including Kansas City, Missouri) in which any of said distributing companies were located. Kansas City was not a party to any of the causes herein except No. 136-N. This suit (No. 136-N herein) was for the purpose of restraining all these defendants from in any way interfering with such rates as the receiver might put in effect in Kansas and Missouri.

The suit (No. 136-N herein) was brought in the United States District for the District of Kansas but subpoenas were issued from that court and served upon the city of Kansas City and other Missouri defendants within the State of Missouri. Kansas City has objected to the jurisdiction of the court and excepted to the overruling of its objections.

The final decree of the court below, among other things, holds that the business of transporting natural gas from the time it leaves the wells in Oklahoma till it reaches the burners of the consumers in Kansas and Missouri is interstate commerce. The final decree further restrains all the defendants (including Kansas City, Missouri) from in any way interfering with the rates put in effect by the receiver and restrains Kansas City and the other cities from interfering with the distributing companies in the putting in force of new rates, and thus nullifies the force of the franchise contract between Kansas City, Missouri, and the Kansas City Gas Company and the franchise contracts in the other cities.

Kansas City, Missouri, contends that

1. The United States District Court for the District of Kansas has no jurisdiction over it in this case.

2. The sale ~~of~~ natural gas in Kansas City, Missouri, by the Kansas City Gas Company is not interstate commerce and therefore the district court could not abrogate the order of the Public Service Commission of Missouri approving an increase in rates in Kansas City in accordance with the franchise contract.

3. Regardless of any question of interstate commerce, the district court had no authority to nullify the franchise contract between Kansas City and the Kansas City Gas Company and its action in so doing was the taking of property of Kansas City and its citizens without due process of law.

Joplin and St. Joseph urge the same objections as to themselves.

A more detailed statement of the facts out of which these questions arise is as follows:

1. The Kansas Natural Gas Company is a corporation organized under the laws of the State of Delaware and licensed to do business in Kansas and Missouri. It operates a system of gas pipe lines extending from the counties of Rogers, Wagoner and Tulsa in Oklahoma into Kansas and thence entering Missouri at three main points. It owns some of its lines and operates the lines of the Kansas City Pipe Line Company and the Marrett Mining Company under lease or otherwise. Approximately fifty per cent of the main trunk line system, including machinery appurtenant thereto, operated by the Kansas Natural Gas Com-

pany and its receiver is owned by the Kansas City Pipe Line Company and held and operated under a certain lease dated January 1, 1908. (For this lease see Record p. 853, for description of property of Kansas City Pipe Line Co., see intervening petition of that company in suit No. 1351 In Equity Record, p. 936.)

2. Neither the Kansas Natural Gas Company nor its receiver own or hold any interest in any stock or property of any local distributing company in the State of Missouri with the possible exception of Purcell, Alba and Neck City.

3. In 1912 an anti-trust suit was brought in the District Court of Montgomery County, Kansas, against the Kansas Natural Gas Company. Later in the same year a suit to foreclose mortgages was brought in the United States District Court for the District of Kansas (suit No. 1351) and receivers were appointed for the properties of the company in Kansas, Missouri and Oklahoma. In the contest between the various parties as to which court should have the custody of the properties, the United States court gave way and turned over all the property of the company in Kansas, Missouri and Oklahoma to the state receivers appointed by the District Court of Montgomery County, Kansas. The Federal court receivers were not removed but they had no property left in their hands. The receivers of the state court were then appointed by the United States District Courts of Missouri and Oklahoma as ancillary receivers in those courts for the properties in those states respectively. The situation was then as follows; the Kansas properties of the company were in the



hands of the Kansas state court receivers and the Missouri and Oklahoma properties were in the hands of United States court receivers who were the same persons as were acting as the Kansas state court receivers. This was the situation when in December, 1915, John M. Landon, Kansas state court receiver (the other co-receiver having died) filed this suit in equity (No. 136-N) in the United States District Court for the District of Kansas, as an ancillary suit to the pending foreclosure suit (No. 1351) previously brought. The only suit to which Kansas City, Missouri, was made a party was the suit at bar (No. 136-N.)

4. The production, transportation and distribution of natural gas was and is accomplished in the following manner:

The Kansas Natural Gas Company and its receivers acquire the gas by drilling, purchase and otherwise in southern Kansas and in Oklahoma and collect it into pipe lines. The gas is caused to flow from the wells into the gathering lines of the Kansas Natural Gas Company by the force of "rock pressures" which are the pressures at which gas is found in place in the earth, varying from 15 pounds to 500 pounds per square inch. These initial pressures carry the gas along in the pipe lines for some distance and then the pressures become lower and in order to carry the gas further it is necessary to deliver it into compressor stations where, by means of engines, the gas is compressed and raised to a pressure of approximately 300 pounds per square inch. Emerging from the compressors, the gas flows along the pipe lines by reason of the increased pressure, toward the next

compressor station which it reaches at a reduced pressure; it is again compressed and sent forward, which process continues till the gas reaches the distributing system or gas holders of the Kansas City Gas Company, or other distributing company.

5. The trunk lines of the Kansas Natural Gas Company were designed to be not only a transportation system but a storage reservoir. Gas is constantly coming from the wells night and day into the lines and the compressor stations are constantly at work compressing it and packing it into the trunk lines. During the night and certain hours of the day, more gas is thus coming into the trunk lines than is being delivered from the trunk lines into the systems of the distributing companies. Gas is sold at a uniform pressure and the quantity of gas in a container depends upon its pressure as referred to the standard pressure. Gas, unlike liquids or solids, can be compressed to a tremendous extent and MORE GAS CAN BE PUT INTO A PIPE LINE THAN CAN BE SENT THROUGH IT. Thus it results that at the hours when more gas is being put into the lines than is being drawn out, a vast quantity of gas is stored up in the lines. All the witnesses who spoke upon the subject were unanimous as to the fact that the trunk lines of the Kansas Natural Gas Co. form a huge storage reservoir for gas. Mr. Samuel S. Wyer, expert witness of the plaintiff, who made a "Report on the Wholesale Cost and Worth of Natural Gas Service at the Gates of the Various Towns, and Valuation of all the Property of the Kansas Natural Gas Company" says at page 19, Section 27 of said report, that the

storage capacity of the 16 inch line of the Kansas Natural Gas Company from Petrolia, Kansas, to Kansas City, 110 miles in length, is 14,634,620 cubic feet. Mr. Alfred Hurlburt, Gas Engineer and expert, stated that the storage capacity of the Kansas Natural Gas Company's pipe line from Grabham, Kansas, to Kansas City, is approximately 12,000,000 cubic feet. (Record, p. 812.) When it is realized that the distance from Petrolia to Kansas City is less than half the length of the Kansas Natural Gas Company's line from the fields to Kansas City, the total storage capacity of the whole line may be more fully understood.

At certain hours of the day when the demand for gas is greater than the amount being put into the lines this great reservoir is drawn upon.

6. The gas is delivered into the lines of the Kansas City Gas Company at 25th Street in Kansas City, Mo., about 600 feet east of the Missouri-Kansas state line and at 39th Street about 1 foot east of the said state line. After the gas enters the lines of the Kansas City Gas Company, that company has the actual physical possession of it and complete control over it and over its distribution and sale.

7. The Kansas City Pipe Line Company entered into certain supply contracts with Messrs. McGowan, Small and Morgan, dated December 3, 1906 (Record p. 844.) The Kansas Natural Gas Company leased the lines of the Kansas City Pipe Line Company by lease dated January 1, 1908 (Record p. 853) and the Kansas City Gas Co. is the successor of the interest of said McGowan, Small and Morgan under said contract. So that

the parties to the said contract are now the Kansas Natural Gas Company and the Kansas City Gas Company.

The Kansas Natural Gas Co. has been delivering gas to the Kansas City Gas Company under the terms of said supply contract. One of the provisions of said contract is that gas shall be delivered to the local distributing system at a pressure of 20 pounds per square inch. The provision from said contract (Exhibit 1001-C) is as follows:

Exhibit 1001-C. Section 1. "The party of the first part hereby agrees that it will \* \* \* supply and deliver through its said pipe line or lines, to said parties of the second part or any successor in ownership of the property the distribution of gas for Kansas City, Mo., at a pressure of twenty (20) pounds at the point of delivery above mentioned, natural gas in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in the contract, for the consideration hereinafter mentioned."

This requirement was for the purpose of receiving gas at a pressure sufficient for its distribution and the pressure is as much a part of the commodity contracted for as is the gas.

8. After reaching the lines of the Kansas City Gas Company the gas is passed through reduction stations which reduce its pressure to a uniform pressure of about 8 inches water column, necessary for convenience and safety in distribution and sale. No gas is ever returned from the Kansas

City Gas Company to the Kansas Natural Gas Company.

9. When a surplus of gas is available in the lines of the Kansas Natural Gas Company, the Kansas City Gas Company fills its gas holders, which have a capacity of 7,000,000 cubic feet, and holds this gas in storage until such time as the Kansas Natural Gas Company cannot deliver enough gas to supply the demand, at which time the gas in the holders is pumped through the lines of Kansas City Gas Company for its consumers. The period during which the gas remains in the holders thus stored, varied from 12 hours to several days or weeks, according to the demand and supply. During the present hearing of this case, gas has thus been used from the holders in Kansas City, Mo.

10. In the contract under which Kansas City Gas Company has been receiving gas from the Kansas Natural Gas Company above referred to, there are no provisions which, as between those parties could prevent Kansas City Gas Company from manufacturing gas and mixing the manufactured gas with such natural gas as might be supplied by the Kansas Natural Gas Company. This is the method, in fact, pursued at St. Joseph, Mo. The natural gas delivered to the St. Joseph Gas Company is mixed with artificial gas which that Company produces and the mixture is sold to consumers. When so mixed the commodity is a different thing from that which the Kansas Natural Gas Company delivered to the St. Joseph Gas Company. The fact that this might be done in Kansas City, Mo., as far as any rights of the Kan-

sas Natural Gas Company or Kansas City Gas Company are concerned, shows that the title and possession of the gas passes to the Kansas City Gas Company when it reaches the lines of the Kansas City Gas Company.

11. Consumers of gas in Kansas City obtain gas by appearing at the office of the Kansas City Gas Company, 910 Grand Avenue, Kansas City, Missouri, and signing an application therefor (Record p. 1072).

12. Gas is turned on for the consumer within from thirty minutes to 5 hours after the time of his application. The Kansas Natural Gas Company is not informed of the application of the consumer nor of the fact that gas is being furnished him.

13. The "consumer's meter" belongs to the Kansas City Gas Company and is generally located in the cellar or basement of the consumer's premises. The consumer is charged by the Kansas City Gas Company for all gas that passes through that meter and is required to pay for it except only in the event that he is insolvent and cannot be made to pay. If after gas passes the consumer's meter, any of it escapes through leaks in the consumer's pipes, the consumer must still pay for it.

14. The consumer receives gas for approximately thirty days before his meter is read. Ten days thereafter he is presented with a bill (Record p. 1072) and ten days thereafter he makes payment therefor in cash or by check to the Kansas City Gas Company at 910 Grand Avenue, Kansas City, Missouri.

15. The Kansas City Gas Company exercises its own judgment and discretion as to extending credit to consumers, without consultation with the Kansas Natural Gas Company or its receivers. It requires a cash deposit from some; it accepts guarantees from others and others having credit it supplies without either deposit or guarantee. It discontinues the supply of gas to consumers who default in payment of bills for a certain period of time and for certain other violations of its rules and regulations.

16. There are no relations or dealings between the consumer in Kansas City, Missouri, and the Kansas Natural Gas Company, nor between the City of Kansas City, Mo., and the Kansas Natural Gas Company.

17. The Kansas City Gas Company does not forward to the Kansas Natural Gas Company any list of the names of consumers or the amount of gas required by all or any of them at any particular future time.

18. The contracts above referred to under which the Kansas Natural Gas Company has been delivering gas to the Kansas City Gas Company provide that for the gas delivered to it by the Kansas Natural Gas Company, the Kansas City Gas Company shall pay on a basis of 62½ per cent of the amount collected from consumers. This has been the basis of payment. When bills were not collectible the amount of such bills was not figured in determining the payment due the Kansas Natural Gas Company. It has been the practice to furnish the Kansas Natural Gas Company the names of the delinquent consumers and if later they paid



their bills, the names of such consumers thus paying up were furnished the Kansas Natural Gas Company to enable that company to check up the two lists and thus determine whether or not it was receiving the amount due it.

19. Payments by the Kansas City Gas Company to the Kansas Natural Gas Company have been made on or about the 15th day of each month for the gas delivered by the Kansas Natural Gas Company to the Kansas City Gas Company prior to about the tenth day of the preceding month.

20. The demands of the consumers of the Kansas City Gas Company during the summer months are approximately 10,000,000 cubic feet per day and during the winter months for lighting and cooking approximately 13,000,000 cubic feet per day and for all purposes, if demands were met, approximately 70,000,000 cubic feet per day.

21. The rates charged by the Kansas City Gas Company and paid by its consumers prior to November 19, 1916, and at all times thereafter until the order made in the receivership case (No. 1351) allowing a rate of 60 cents (For order see Record p. 1068) were those named in Ordinance No. 33887 of Kansas City, Mo., the franchise ordinance by authority of which the Kansas City Gas Company is now occupying the streets of Kansas City, Mo. This is the only franchise ordinance to furnish or deliver natural gas in Kansas City, Missouri.

22. The rates charged by the Kansas City Gas Company and paid by its consumers since November 19, 1916, until the above order in No. 1351, are those specified in said Ordinance No. 33887 and

approved by the Public Service Commission of Missouri pursuant to a new schedule of rates and an application filed with said Commission by said Kansas City Gas Company on August 10, 1916, increasing the rates from 27 cents to 30 cents net per thousand cubic feet. (Record pp. 361 to 366 inclusive.)

23. Neither the Kansas Natural Gas Company or its receiver has any franchise or right to occupy or use the streets of Kansas City, Missouri, for the distribution or sale of natural gas.

24. The City of Kansas City, Missouri, is a municipal corporation duly organized and existing under the Constitution and laws of the State of Missouri, by special charter. Section 16 of Article IX of the Constitution of Missouri of 1875 authorized cities having a population of more than 100,000 inhabitants to frame their own charters. Said section is as follows:

"Sec. 16. Large Cities May Frame Their Own Charters, How Adopted and Amended. —Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, \* \* \* it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof. \* \* \* and all courts shall take judicial notice thereof; \* \* \* but such charter shall always be in harmony with and subject to the Constitution and laws of the State."

25. In order to resolve any doubt as to whether or not this Constitutional provision was self executing, the General Assembly passed what is known as the Enabling Act (Laws of Missouri 1887, p. 42) to definitely authorize such cities to frame their charters in accordance with such Constitutional provision. Section 1 of that Act is as follows:

26. "Section 1. Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government consistent with and subject to the constitution and laws of this state, \* \* \* (The section provides the method by which the charter is to be adopted) it shall, at the end of thirty days thereafter, become the charter of such city and supersede any existing charter and amendments thereof. \* \* \* and all courts shall take judicial notice thereof."

27. Sections 50 and 51 of that act are as follows: "Section 50. Such city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary notwithstanding."

28. "Sec. 51. It shall be lawful for any city in such charter or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any streets or public places of such city, whether such fran-

chise or privileges have been granted by said city or by or under the State of Missouri, or any other authority."

(The above set forth sections are incorporated in the Revised Statutes of Missouri of 1889 as Sections 1840, 1889 and 1890, and in the Revised Statutes of Missouri of 1909 as Sections 9703, 9752 and 9753 respectively.)

29. In the twenty-eighth paragraph of Section 1 of Article II of the city charter, adopted May 9, 1889 and in force at the time the gas franchise ordinance was passed, it is provided that the city shall have power by ordinance "\* \* \* to regulate the prices to be charged by telephone, telegraph, gas and electric light companies," etc., the said paragraph of said section is as follows:

"Twenty-eighth. To regulate the prices to be charged by telephone, telegraph, gas and electric light companies, and to compel them and all persons and corporations using, controlling or managing electric wires for any purpose whatever to put and keep their wires under ground, and to regulate the manner of doing the same and the use of all such wires and all connections therewith."

30. Section 1 of Article XIV of said charter granted the city power to construct and operate gas works, electric works and similar works. Said section is as follows:

"Section 1. The city shall have power to construct and operate gas works, or electric light works, or any other kind of works for the purpose of lighting streets and public

buildings and premises and property of private persons, and also to purchase any kind of such works heretofore or hereafter erected, and to operate the same for such purpose."

31. "Section 12 of said article authorized the city to grant a franchise to any person or corporation for the operation of the kind of works specified in said Section 1. Section 12 is as follows:

"Section 12. The city may grant to any person or corporation the right or franchise to conduct the material or means for lighting from any kind of works specified in the first section of this article, under or along or over any of the streets, avenues, alleys or public highways, or public grounds of the city for the purpose of lighting streets, avenues, alleys and public highways of the city and public buildings and private premises; but no franchise or grant for any such purpose shall confer an exclusive right nor be made for a longer period than thirty years, nor be renewed or extended except within the last two years of such term, and then not beyond thirty years: provided, that no such person or corporation shall in any event charge more for light for the city or private parties than the price specified from time to time by ordinance of the city, and that the city shall also have power to regulate and fix from time to time the prices such person or company may charge for the renting of meters or apparatus for ascertaining the quantity of material or means consumed for lighting: and provided further, that the city shall not, in making the original grant, nor in any manner subsequent thereto, ever agree or bind itself to pay any fixed price for lighting streets, avenues, pub-

lic highways, alleys, public grounds or public buildings of the city for a longer period than one year at a time. In case of any such grant to a person or corporation the city shall always have the right to designate the kind of meter or apparatus to be used for the correct measurement of the material or means furnished for lighting under such grant, and to provide for inspecting and regulating same, and to compel an exact compliance with any provisions made by ordinance in that regard; and the city shall also have the right to appoint one or more measurers, whose duty it shall be to inspect all such meters and apparatus and certify to the correctness of all bills made against the consumers of the material or means for lighting, and perform such other duties as may be prescribed by ordinance. Every person or corporation using a grant or franchise under this section shall in using or occupying the streets, avenues, public highways, alleys, public grounds and public buildings of the city, conduct work and operations as may be from time to time prescribed by ordinance, and so as to avoid unnecessary injury or inconvenience to the public and all citizens, and so as to avoid injury and damage to all persons and parties and private property, and shall use at least the same care to avoid such injury and damage that the city would be bound to use if it was conducting such work and business, and shall save the city harmless from all loss, costs and expense on account of any such injury or damage, and on account of anything done in the prosecution of any such work, and the use of any such grant or franchise, and when any street, avenue, public highway or alley, or public ground shall be opened or disturbed in the construction of any such work, shall repair

the same to the satisfaction and approval of the board of public works, and so as to leave the same in as good condition for ordinary public use as it was at the time of opening or disturbing the same, and no such opening or disturbance shall be continued longer than necessary. Whenever the city may grant any right or franchise under this section it shall have the right to purchase the works, and all the appurtenances belonging thereto for furnishing the material and means for lighting, at any time during the term for which such grant may be made, whether such right be reserved expressly in the grant or not. The city may exercise all power conferred by this section by ordinance, and may, by ordinances, from time to time, make provisions for accomplishing the results herein contemplated, and enforce the same."

32. By authority of all of the above authorizations Kansas City entered into a certain franchise contract, being Ordinance No. 33887 of Kansas City, approved September 27, 1906, (Record p. 832) with Messrs. McGowan, Small and Morgan. Said franchise contract was thereafter transferred to and assumed by the Kansas City Gas Company and now constitutes a binding contract between the City of Kansas City, Missouri, and the Kansas City Gas Company. Kansas City has at all times kept and performed all the provisions and conditions of said contract.

No proceedings are shown to have been instituted by Kansas City, Missouri, in any court or tribunal against the Kansas City Gas Company or the Kansas Natural Gas Company or its receivers.



## ASSIGNMENT OF ERRORS

### **By the City of Kansas City, Missouri, Defendant and Appellant in the Above Entitled Cause.**

Comes now the City of Kansas City, Missouri, defendant and appellant in the above entitled cause, and says that in the record and proceedings of said court in the above entitled cause and in the final decree made and entered therein the court erred in the following particulars:

#### I.

The court erred in holding that Section 56 of the Judicial Code authorized the issuing and executing of the process of subpoena against Kansas City, Missouri, in this suit.

#### II.

The court erred in refusing to dismiss the bill of complaint and the supplemental bill for the reason that the court did not have jurisdiction of this cause.

#### III.

The court erred in holding that it had jurisdiction of defendant, Kansas City, Missouri, in said cause and in overruling the motion of said defendant to dismiss the bill of complaint as to it, because:

(a) The writ of subpoena was served upon Kansas City, Missouri, in the State of Missouri, outside of the jurisdiction of the District Court of the United States for the District of Kansas, and without authority of law, and said court did not

have jurisdiction of the defendant, Kansas City, Missouri, in said cause.

(b) The facts stated in said bill of complaint do not constitute a cause of action or ground of relief in equity in favor of the plaintiff and against Kansas City, Missouri.

(c) The bill of complaint is multifarious in that it is exhibited against a multitude of defendants for many distinct matters and causes, in many of which, as appears by said bill, Kansas City, Missouri, is in no way interested.

#### IV.

The court erred in denying and overruling each of the defenses in point of law arising upon the face of the bill of complaint, and on the face of the supplemental bill of complaint, pleaded by Kansas City, Missouri, in its answer to the bill of complaint, and in its answer to the supplemental bill of complaint.

(a) That the subpoena in this suit was served upon Kansas City, Missouri, a municipal corporation of said state, in Jackson county, Missouri, outside of the State and District of Kansas, for which reasons said subpoena and service thereof on this defendant was, and is, without authority of law and void, and this court does not have jurisdiction of this defendant in this suit.

(b) That there is a misjoinder of parties defendant in said suit.

(c) That there is a misjoinder of causes of action in said bill of complaint whereby it is multifarious.

(d) That it appears on the face of the bill of

complaint that the matters and things therein averred do not constitute a cause of action in favor of the plaintiff or against the defendant, Kansas City, Missouri, and do not entitle the plaintiff to the relief prayed for or to any relief against it.

(e) That the plaintiff, for reasons appearing on the face of the bill, is not without adequate remedy in due course of law for redress of any wrongs complained of.

(f) That it appears on the face of the supplemental bill of complaint that the matters and things therein averred do not constitute a cause of action in favor of plaintiff and against the defendant, Kansas City, Missouri, and do not entitle the plaintiff to the relief prayed for or to any relief against it.

#### V.

The court erred in holding that the bill of complaint and supplemental bill of complaint, or either of them, states a cause for relief in a court of equity against Kansas City, Missouri.

#### VI.

The court erred in granting a permanent injunction against Kansas City, Missouri, in said final judgment, after the enlarged court had decided on the application for a temporary injunction that the plaintiff was not entitled to any relief as against Kansas City, Missouri, the evidence at the two said hearings being substantially the same.

#### VII.

The court erred in enjoining Kansas City, Missouri, from enforcing its ordinance contract rates

against the Kansas City Gas Company, because in that respect the decree is broader than the issues made by the pleading in the cause.

### VIII.

The court erred in its final decree in granting a permanent injunction against Kansas City, Missouri, because

(a) The evidence showed that Kansas City, Missouri, had not passed any ordinance or instituted or prosecuted any suit or proceeding against the Kansas Natural Gas Company or its receivers, and had not done or threatened to do any act or thing to impair any right possessed by the Kansas Natural Gas Company and its receivers, or to hinder the exercise of any such right.

(b) The evidence showed that neither the Kansas Natural Gas Company nor its receivers have any right, license or franchise, of any character, to do business within the corporate limits of Kansas City, Missouri, and that neither the Company nor its receivers own any property within the corporate limits of the city.

(c) That the evidence showed that Kansas City Gas Company is an independent dealer in natural gas and is not the agent, for any purpose, of the Kansas Natural Gas Company or of its receivers.

(d) That the supplemental bill of complaint alleges, and the evidence showed, that all natural gas sold by the receivers to the Kansas City Gas Company is delivered at or near the city limits of Kansas City, Missouri, and that thereafter the Kansas City Gas Company has complete and undivided control and direction of the sale, disposition and distribution of said gas.

## IX.

The court erred in its final decree in holding that the Kansas Natural Gas Company and its receivers, or any of them, are engaged in selling or delivering natural gas to consumers in Kansas City, Missouri.

## X.

The court erred in holding that the sale and delivery of gas to consumers in Kansas City, Missouri, is interstate commerce.

## XI.

The court erred in holding that the transportation of gas from Oklahoma to Kansas City, Missouri, is interstate commerce of a national and not of a local character.

## XII.

The court erred in holding that the business of selling and delivering gas carried on by the Kansas City Gas Company in Kansas City, Missouri, is interstate commerce.

## XIII.

The court erred in holding that the order made by the Public Service Commission of the state of Missouri, August 10, 1916, in cause No. 1050, on the petition of the Kansas City Gas Company, authorizing new rates for natural gas in Kansas City, Missouri, was an illegal attempt to burden and regulate interstate commerce, because the rates authorized by said order are the rates fixed in said Ordinance Contract No. 33887.

## XIV.

The court erred in holding that the order of the Public Service Commission of the state of Mis-

souri, August 10, 1916, authorizing new rates for natural gas in Kansas City, Missouri, was the taking of property without due process of law because said rates are the rates fixed by said Ordinance Contract No. 33887, of Kansas City, Missouri.

#### XV.

The court erred in its final decree in granting relief to the complaints against defendant, Kansas City, Missouri, because no ground for relief is stated either in the original bill or in the supplemental bill, and no ground for relief was shown by the evidence against said defendant.

#### XVI.

The court erred in its final decree in enjoining Kansas City, Missouri, from enforcing against the Kansas City Gas Company the Ordinance Contract rates for natural gas, because thereby the city is deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

#### **Assignment of Errors by the City of Joplin, Missouri, Defendant and Appellant in the Above Entitled Cause.**

Comes now the City of Joplin, Missouri, defendant and appellant in the above entitled cause, and says that in the record and proceedings of said court in the above entitled cause and in the final decree made and entered therein the court erred in the following particulars:

## I.

The court erred in holding that Section 56 of the Judicial Code authorized the issuing and executing of the process of subpoena against Joplin, Missouri, in this suit.

## II.

The court erred in refusing to dismiss the bill of complaint and the supplemental bill for the reason that the court did not have jurisdiction of this cause.

## III.

That the court erred in holding that it has jurisdiction of defendant Joplin, Missouri, in said cause, because:

(a) The writ of subpoena was served upon Joplin, Missouri, in the State of Missouri, outside of the jurisdiction of the District Court of the United States for the District of Kansas, and without authority of law, and said court did not have jurisdiction of the defendant Joplin, Missouri, in said cause.

(b) The facts stated in said bill of complaint do not constitute a cause of action or ground of relief in equity in favor of the plaintiff and against Joplin, Missouri.

(c) The bill of complaint is multifarious in that it is exhibited against a multitude of defendants for many distinct matters and causes, in many of which, as appears by the bill, Joplin, Missouri, is in no way interested.

## IV.

The court erred in holding that the bill of complaint and supplemental bill of complaint, or



either of them, states a cause for relief in a court of equity against Joplin, Missouri.

#### V.

The court erred in granting a permanent injunction against Joplin, Missouri, in said final judgment, after the enlarged court had decided on the application for a temporary injunction that the plaintiff was not entitled to any relief as against Joplin, Missouri, the evidence at the two said hearings being substantially the same.

#### VI.

That the court erred in enjoining Joplin, Missouri, from enforcing its ordinance contract rates against the Joplin Gas Company, because in that respect the decree is broader than the issues made by the pleadings in the cause.

#### VII.

The court erred in its final decree in granting a permanent injunction against Joplin, Missouri, because

(a) The evidence showed that Joplin, Missouri, had not passed any ordinance or instituted any suit or proceedings against the Kansas Natural Gas Company or its receivers, and had not done or threatened to do any act or thing to impair any right possessed by the Kansas Natural Gas Company and its receivers, or to hinder the exercise of any such right.

(b) The evidence showed that neither the Kansas Natural Gas Company nor its receivers have any right, license or franchise of any character to do business within the corporate limits of Joplin,

Missouri, and that neither the company nor its receivers own any property within the corporate limits of the city.

(c) The evidence showed that Joplin Gas Company is an independent dealer in natural gas and is not the agent, for any purpose, of the Kansas Natural Gas Company or its receivers.

(d) The evidence shows that all natural gas sold by the receivers to the Joplin Gas Company is delivered at or near the city limits of Joplin, Missouri, and that thereafter the Joplin Gas Company has complete and undivided control and direction of the sale and distribution of said gas.

#### VIII.

The court erred in its final decree in holding that the Kansas Natural Gas Company and its receivers, or any of them, are engaged in selling or delivering natural gas to consumers in Joplin, Missouri.

#### IX.

That the court erred in holding that the sale and delivery of gas to consumers in Joplin, Missouri, is interstate commerce.

#### X.

That the court erred in holding that the transportation of gas from Oklahoma to Joplin, Missouri, is interstate commerce of a national and not of a local character.

#### XI.

That the court erred in holding that the business of selling and delivering gas to consumers in Joplin, Missouri, is interstate commerce.

## XII.

The court erred in its final decree in granting relief to the complainants against defendant Joplin, Missouri, because no ground for relief is stated either in the original bill or in the supplemental bill, and no ground for relief was shown by the evidence against said defendant.

## XIII.

The court erred in its final decree in enjoining Joplin, Missouri, from enforcing against the Joplin Gas Company the Ordinance Contract rates for natural gas, because thereby the City is deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

## XIV.

The court erred in its final decree in holding that the rate of twenty-five cents in effect in the City of Joplin was a rate confiscatory of the property of the Kansas Natural Gas Company or the Joplin Gas Company, for the reason that said rate was the rate provided by the franchise contract existing between the City of Joplin and the Joplin Gas Company.

**Assignment of Errors by the City of St. Joseph,  
Missouri, Defendant and Appellant in the  
Above Entitled Cause.**

Comes now the City of St. Joseph, Missouri, defendant and appellant in the above entitled cause, and says that in the record and proceedings of said court in the above entitled cause and

in the final decree made and entered therein the court erred in the following particulars:

I.

The court erred in holding that Section 56 of the Judicial Code authorized the issuing and executing of the process of subpoena against St. Joseph, Missouri, in this suit.

II.

The court erred in refusing to dismiss the bill of complaint and the supplemental bill for the reason that the court did not have jurisdiction of this cause.

III.

That the court erred in holding that it had jurisdiction of defendant St. Joseph, Missouri, because:

(a) The writ of subpoena was served upon St. Joseph, Missouri, in the State of Missouri, outside of the jurisdiction of the District Court of the United States for the District of Kansas, and without authority of law, and said court did not have jurisdiction of the defendant St. Joseph, Missouri, in said cause.

(b) The facts stated in said bill of complaint do not constitute a cause of action or ground of relief in equity in favor of the plaintiff and against St. Joseph, Missouri.

(c) The bill of complaint is multifarious in that it is exhibited against a multitude of defendants for many distinct matters and causes, in many of which, as appears by said bill, St. Joseph, Missouri, is in no way interested.

## IV.

The court erred in holding that the bill of complaint and supplemental bill of complaint, or either of them, states a cause for relief in a court of equity against St. Joseph, Missouri.

## V.

The court erred in granting a permanent injunction against St. Joseph, Missouri, in said final judgment, after the enlarged court had decided on the application for a temporary injunction that the plaintiff was not entitled to any relief as against St. Joseph, Missouri, the evidence at the two said hearings being substantially the same.

## VI.

The court erred in its final decree in granting a permanent injunction against St. Joseph, Missouri, because

(a) The evidence showed that St. Joseph, Missouri, had not passed any ordinance or instituted any suit or proceeding against the Kansas Natural Gas Company or its receivers, and has not done or threatened to do any act or thing to impair any right possessed by the Kansas Natural Gas Company and its receivers, or to hinder the exercise of any such right.

(b) The evidence showed that neither the Kansas Natural Gas Company nor its receivers have any right, license or franchise of any character to do business within the corporate limits of St. Joseph, Missouri, and that neither the company nor its receivers own any property within the corporate limits of the city.

(c) The evidence showed that St. Joseph Gas Company is an independent dealer in natural gas and is not the agent, for any purpose, of the Kansas Natural Gas Company, or its receivers.

(d) The evidence shows that all natural gas sold by the receivers to the St. Joseph Gas Company is delivered at or near the city limits of St. Joseph, Missouri, and that thereafter the St. Joseph Gas Company has complete and undivided control and direction of the sale and distribution of said gas.

#### VII.

The court erred in its final decree in holding that the Kansas Natural Gas Company and its receivers, or any of them, are engaged in selling or delivering natural gas to consumers in St. Joseph, Missouri.

#### VIII.

That the court erred in holding that the sale and delivery of gas to consumers in St. Joseph, Missouri, is interstate commerce.

#### IX.

The court erred in holding that the transportation of natural gas from Oklahoma to St. Joseph, Missouri, is interstate commerce of a national and not of a local character.

#### X.

The court erred in its final decree in granting relief to complainants against defendant, St. Joseph, Missouri, because no ground for relief is stated either in the original bill or in the supplemental bill, and no ground for relief was shown by the evidence against said defendant.

## **BRIEF AND ARGUMENT.**

### **I. The court had no jurisdiction of the Missouri defendants.**

At the outset it should be noted that the Missouri defendants stand in a different relation to this case than do the Kansas defendants in the matter of jurisdiction. There had been a receivership going on in the United States District Court for the District of Kansas pursuant to the foreclosure of mortgages. Previous to this receivership an action under state anti-trust laws of Kansas had been begun in the Kansas State Court of Montgomery County against the same company (The Kansas Natural Gas Company) (Rec. p. 801). In the contest (Rec. p. 803) between the various parties as to which court should have the custody of the properties, the United States Court gave way and turned over all the property of the Kansas Natural Gas Company in Kansas, Missouri and Oklahoma to the state court of Montgomery County, Kansas (Rec. p. 805, par. 41; pp. 1001, 1005, 1006). The Federal receiver was not removed but he had no property left in his possession. The receivers of the Kansas State Court were then appointed by the United States Courts of Missouri and Oklahoma as ancillary receivers in those courts for the properties in those states. The situation was then this: the Kansas property was in the hands of the Kansas State Court receivers and the Missouri and Oklahoma properties

were in the hands of the United States Court receivers who were the same persons that were acting as the Kansas State Court receivers. This was the situation when in December, 1915, John M. Landon, Kansas State Court receiver (the other state court receiver having died) filed this suit in the United States District Court of Kansas. Subpoenas were issued from that court and served upon the Missouri defendants in the State of Missouri (Rec. pp. 93 to 99 inc.). It is our contention that the court did not obtain jurisdiction over them thereby, for the following reasons:

**1. Process cannot issue out of the United States District Court in one state and be served in another state unless specially authorized by law.**

It is clear that the United States Courts of Kansas and Missouri are entirely separate jurisdictions and that process from one cannot be effective in the other unless there is some very definite authorization to be found for it.

*Jellenik vs. Huron Copper Mining Co.*, 177 U. S. 1 at 10.

*United States vs. American Lumber Co.*, 85 Fed. 827.

*Winter vs. Koon, Schwartz & Co.*, 132 Fed. 273.

**2. District Courts of the United States are courts of limited jurisdiction and their policy is not to stretch their powers for the purpose of acquiring jurisdiction.**

*Kempe's Lessee vs. Kennedy*, 5 Cram. 173 at 185.

*Robertson vs. Cease*, 97 U. S. 646.



*Grover vs. Amer. Central Ins. Co.*, 109 U. S. 278, 283.

*Great Southern Fire Proof Hotel Co., vs. Jones*, 177 U. S. 449 at 453.

**3. Service of process in Missouri was not authorized in this case by Section 57 of the Judicial Code.**

While that section provides for certain cases in which process may be effective outside the district it is limited to cases concerned with the enforcing of liens and removing clouds from title to realty.

*Jellenik vs. Huron Copper Mining Co.*, 177 U. S. 1.

**4. Service of process in Missouri was not authorized in this case by Section 56 of the Judicial Code.**

It seems to us that the section does not apply to our case for the following reasons:

**A. The purpose of Section 56 is to aid in the collection of assets; this suit is not for the purpose of collecting assets.**

Previous to the enactment of this section the collection and control of assets by a receiver in a district court of the United States had been much more cumbersome and difficult for the reason that a receiver appointed by the United States Court of one state could not take possession of the property of the same ownership in an adjoining state. (*Kittel vs. Augusta, Tallahassee & Gulf R. R. Co.*, 78 Fed. 855.) Frequently this resulted in considerable dissipation of the estate and inefficient administration of the property as a whole.

The evident purpose of Sec. 56, then, was to remedy this matter by permitting a receiver to collect and control the assets in neighboring states, thus making administration more easy and efficient for the entire property. The collection and control of the properties is the clear intention of the section. As a means of obtaining control when conflict might arise, the section provides, that "process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district." What property? Evidently the property of the estate that the receiver is charged to collect and preserve. This last quoted phrase again shows most definitely that the purpose of the section was to aid in the collection of the assets. The privilege conferred by this section is thus meant to be employed by a Federal receiver for a special purpose. To permit any other person to employ the privilege of this section to any sort of suit he might choose, is outside the letter and the purpose of the section and might lead, as it has in this very case, to a serious abuse of the court's process.

**B. There was no receiver of the United States District Court of Kansas in charge of the property at the time this suit was commenced, and the fundamental condition of Section 56 is therefore not satisfied.**

At the time process was issued and served, there was no receiver of the United States District Court of Kansas in control of the property and thus the fundamental condition of the section is not satisfied.

It is true there was a nominal receiver under appointment of the United States Court but he had no item of property in his possession; it had all been turned over to the state court of Kansas. He was not a real receiver; he was an empty and naked official with no duties and no responsibilities.

"A receiver is an indifferent person between the parties to a cause appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it."

High on Receivers, 4th Ed. Sec. 1.

"A receiver generally speaking is one to whom anything is delivered by another. But the use of the word in reference to the subject of which we are to treat means a ministerial officer of the court of chancery appointed as an impartial and indifferent person between the parties to a suit to take possession of and preserve, *pendente lite*, and for the benefit of the party ultimately entitled to it, the fund or property in litigation when it does not seem equitable to the court that either party should have possession or control of it."

Beach on Receivers, Alderson's Ed., Sec. 2.

To say, then, that the United States receiver then in shadowy existence is such a receiver and his naked receivership is such a receivership as is contemplated by Section 56 for the purpose of en-

larging territorial jurisdiction seems an unwarranted stretch of that section.

**II. The plaintiff is entitled to no relief against the cities because they have committed no act of interference with the natural gas business.**

**1. The only act done by Kansas City was to consent to the new rate put in force August 10, 1916, by the Kansas City Gas Company, which rate was provided for by the franchise ordinance 33887 of said city.**

In the original Bill of Complaint no specific act is charged to have been committed by Kansas City, Missouri, interfering with plaintiff or the natural gas business. In the Supplemental Bill the only act charged against Kansas City, Missouri, and the only act proved was in consenting to the installation of a new rate in that city by the Kansas City Gas Company (Rec. pp. 344, 345.) This came about in the following way:

Kansas City, Missouri, has no contractual relation with the Kansas Natural Gas Company or its receiver (Rec. p. 814, par. 73); its sole contract and relation is with and to the Kansas City Gas Company under ordinance 33887, the franchise ordinance under which the Kansas City Gas Company occupies the streets of Kansas City. By the terms of this franchise (Rec. p. 832) the Kansas City Gas Company was permitted to charge 25 cents per thousand feet for gas during the first five years of the franchise, 27 cents during the next five years and thirty cents thereafter. The franchise having been granted in 1906 it transpired that 1916 was the time to advance the rate

of 30 cents in accordance with such provision. The Kansas City Gas Company went about it by filing a petition with the State Public Service Commission (Rec. pp. 361 to 366 inc.) (which Commission had meanwhile been established in 1913) to which petition Kansas City entered its consent and the rate thereupon went into effect. No threats of any other act by Kansas City are shown to have been made. Surely this act was no interference with the natural gas business or with the plaintiff or any one else since it was strictly in compliance with the contract of the city. The petition should have been dismissed as against Kansas City, therefore, since it stated no ground of action against such city and this defendant ought not to have been kept in the case, and this defendant ought not to have been included in the decree and thus had its hands tied over local matters when no act of interference with the natural gas business or with interstate commerce was proven against it.

**2. The cities of Joplin and St. Joseph, Missouri, also have committed no act of interference with the natural gas business or interstate commerce.**

The only acts alleged to have been committed by Joplin were concerned with enforcing its franchise contract with the Joplin Gas Company. (Rec. p. 347.) The Joplin Gas Company filed a new rate with the Missouri Public Service Commission and the City of Joplin filed a petition with the Commission to prevent the putting in of any rate other than that fixed by the franchise ordinance. The

Supplemental Bill alleged certain threats of the City to arrest Joplin Gas Company's officials if the new rate were put in effect. This was denied in the pleadings and was not proved.

The City of Joplin has no contract or arrangement with the Kansas Natural Gas Company or its receiver but deals exclusively with the Joplin Gas Company. (Rec. p. 664 to 668 incl.) No specific acts are alleged to have been committed by the City of Joplin, Missouri.

The Bill of Complaint makes allegations concerning the non-compensatory character of the rates put in effect in St. Joseph by order of the Public Service Commission of Missouri but does not charge the city of St. Joseph with being responsible therefor.

In the case of Joplin and St. Joseph, therefore, as well as Kansas City, Missouri, no acts of interference with the natural gas business or with interstate commerce are shown and these cities should have been released from the burden of continuing in the suit and of being subjected to the provisions of the decree.

### **III. The sale of natural gas in Kansas City, Joplin and St. Joseph is not interstate commerce.**

There are several features of the natural gas business as it is shown to be conducted which definitely determine that it has an interstate character only until it reaches the local distributing company and its interstate character then ceases.

Any one of these features seems adequate to take away the interstate character of the business

and make it a matter solely of state concern. These features will be first considered in reference to Kansas City, which furnishes a typical example.

**1. The interstate character of the shipment ceases when the gas is delivered to the distributing company.**

One of these items which thus affects the character of the business is the fact that the gas becomes the property of the Kansas City Gas Company as soon as it enters the mains of that company. The gas is sold by the Kansas Natural Gas Company directly to the Kansas City Gas Company. The Kansas Natural has no dealings with the consumer; it delivers the gas to the local company and then its work is done. It cannot have dealings with the consumer because it has no permission to do business in the city. The Kansas City Gas Company is the retailer. When a molecule of gas starts from the well in Oklahoma none knows what consumer in Kansas City will receive it or whether it will not perhaps be used by the Kansas City Gas Company itself and not be resold at all. The consumers are constantly changing, for that matter. No consumer orders any special gas and he may have the gas cut off at any time. The only reasonable intention which can be held as to this gas is that it shall go to the local company and then shall be disposed of as that company shall provide. The gas reaches its interstate destination when it reaches the Kansas City Gas Company. After that the company sends it around where it chooses and in accordance with contracts and arrangements in which the Kansas Natural has and can have no part whatever.

No agency can be built up between the Kansas City Gas Company and the Kansas Natural based on the fact that when the local company comes to pay for the gas the amount of the payment is figured on a percentage basis. Such a question arose in the case of *Banker Bros. Co. vs. Pennsylvania*, 222 U. S. 210. In that case Banker Bros. in Pittsburgh took orders for automobiles and sent the orders with 10 per cent of the price to Pierce in Buffalo. The bill of lading with draft attached was sent to Banker Bros. and he paid it and remitted 80 per cent to Pierce. The court held that this did not establish any agency and that therefore the transaction was not of an interstate character and hence was subject to taxation in Pennsylvania. The court said (l. c. 213):

"The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Company with whom alone he dealt. If he had failed to complete the purchase the Pierce Company would have had no right to sue him on the contract, the fact that he was liable for the freight by virtue of the agreement to 'pay list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory, neither was that result accomplished because with the machine, Banker Bros. also delivered to the buyer in Pittsburgh a warranty from the manufacturer direct."

In subdivision 17 of the Supplemental Bill of Complaint herein, the plaintiff charges that when



he was notified by the Kansas City Gas Company of

"its refusal to put into force and effect the scale of prices fixed by this plaintiff, plaintiff notified said Kansas City Gas Company that from and after September 1, 1916, he would charge said Kansas City Gas Company for gas delivered to it by him at a price of 18 cents per thousand cubic feet at the gates of the plant of the Kansas City Gas Company, being points where the gas is transferred from the pipe lines of this plaintiff to the distributing plant of the Kansas City Gas Company. \* \* \*

"That since the giving of said notice, this plaintiff has at all times insisted, and now insists, upon payment from the Kansas City Gas Company for natural gas so delivered to it from and after September 1, 1916, at the rate of 18 cents per thousand cubic feet as measured by meter at the gate of said distributing plant."

It is shown by the evidence in the case at this hearing that since September 1, 1916, the receiver has charged the Kansas City Gas Company with gas as delivered by the receiver at the point of connection between the pipes of the Kansas City Gas Company and pipes operated by the receiver, as shown by meters set at or near those points.

Kansas City, Missouri, contends (so also does the Kansas City Gas Company) that no relation of agency ever at any time existed between the Kansas City Gas Company and the Kansas Natural Gas Company or its receivers. If the receiver ever at any time believed an agency existed

between the Kansas Natural Gas Company or its receivers and the Kansas City Gas Company, he abandoned all faith in that proposition at the time he served notice of his intention to charge 18 cents at the point of delivery, as defined in said 17th subdivision of the Supplemental Bill, wherein it clearly appears that from that time on it was his purpose to regard, and he did regard, the Kansas City Gas Company as an independent purchaser of gas so delivered, whether the Kansas City Gas Company resold the gas or permitted it to escape and go to waste, and without regard to the price received for any such gas by the Kansas City Gas Company.

**2. The interstate movement ceases when the gas is stored in the reservoirs.**

As pointed out in the statement of facts, the main trunk lines of the Kansas Natural became a huge storage reservoir for natural gas. The storage capacity of a section leading to Kansas City was placed by experts at from 12,000,000 to 14,000,000. The fact that this reservoir happens to be long and slim does not make it any the less a great storage reservoir. When the Kansas City Gas Company wants gas it draws on this reservoir and takes out some just as it might go to a tank and draw off a gallon of molasses.

Another storage reservoir is the big gas tank maintained by the local company in Kansas City. Here the company stores up a supply of gas during times of small consumption and thus has it ready for times of peak-load demand.

And why should not this item of storage follow the same rule which this Court has laid down elsewhere when an interstate shipment goes into storage? This matter was considered in the case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500. In that case the company manufactured goods at various plants in Ohio and shipped them to Memphis, where its agents stored them in warehouses, pending further shipment to purchasers. When orders came to the main office in Chicago that office sent directions to Memphis to forward such and such supplies to such and such points. It was plainly stated in the case that the goods so held at Memphis were sent and held there only temporarily till the identity of the ultimate consumer was determined. The Court, the Chief Justice speaking, said (l. c. 518):

"With these facts in mind we are of opinion that the court below was right in deciding that the goods were not in transit, but on the contrary had reached their destination at Memphis and were there held in store at the risk of the steel company to be sold and delivered as contracts for that purpose were completely consummated."

And the Court held that the goods were therefore subject to the taxing power of the State of Tennessee.

*General Oil Company v. Crain*, 209 U. S. 211, is another storage case where it was held that the fact that the oil was put in storage determined that its interstate movement had ceased. In that case the company shipped oil in tank cars

to Memphis for the purpose of there putting it up in barrels and sending it on to the ultimate consumers in Tennessee and other states. Here again the court decided that "it had reached the destination of its first shipment," was therefore not interstate commerce and hence was subject to the taxing power of the State of Tennessee.

**3. The interstate movement ceases when the gas is mixed with the mass of property of the state.**

In *Brown v. Houston*, 114 U. S. 622, the property in question was coal shipped from Pennsylvania to Mississippi for the purpose of being transhipped to foreign destinations. It was still lying on the barge in the river and yet the court held it to have become mixed with the property of the state so as to be taxable, and said of the situation (l. c. 632):

"It (the tax) was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans."

And so, *a fortiori*, we must say upon such authority, that when the natural gas gets into the mains of the local company it has reached its destination. It ceases to be interstate commerce.

Upon the question of the termination of the interstate shipment the case of *Atchison, Topeka & Santa Fe R. R. Co. v. Harold*, 241 U. S. 371, has been suggested as an authority for holding

that a temporary stop does not terminate the interstate character of the shipment. That the case does not stand for this principle but that the court very clearly had another point in mind as the determining consideration in the case is shown by the court's language (l. c. 375):

"The motion to dismiss referred to at the outset is based on the ground that the action of the court involved no question of interstate commerce but purely one of intrastate commerce. But this disregards the fact THAT THE BILL OF LADING WHICH WAS SUED UPON WAS AN INTER-STATE COMMERCE BILL COVERING A SHIPMENT FROM KANSAS CITY, MISSOURI, TO ELK FALLS, KANSAS."

And it was therefore held that the shipment was an interstate one.

The situation and methods of doing business in Joplin and St. Joseph are similar to those in Kansas City and the local distributing gas business in those places is equally intrastate. The St. Joseph situation is interesting in that it shows an additional argument for the fact that the gas becomes mixed with the mass of property of the state before it is delivered to the consumer. In that city the local company manufactures some gas and mixes it with the natural gas purchased from the Kansas Natural. The resulting gas is certainly something different from the gas that comes over the state line; it has clearly, and in a physical sense, been mixed with the property of the state and its interstate character lost. The same pro-

cedure might, as far as the rights of Kansas Natural are concerned, be carried out in Joplin and Kansas City.

**IV. The business of the Kansas Natural Gas Company and of its receivers is in its nature local, neither requiring nor being capable of uniform treatment. Congress not having regulated it, the States may regulate it in a reasonable way to protect the health and convenience of their citizens.**

The exclusive right of Congress to regulate commerce with foreign nations, among the several states, and the Indian tribes, exists where the subject involved is national in its character and permits of only one uniform method of regulation.

In *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 How. 299, the foregoing doctrine was announced by the Supreme Court, wherein the court said (l. c. 319):

"Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly vast subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating clearly on the commerce of the United States in every port; and some like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

Willoughby on the Constitution, Sec. 308, says:

"The doctrine of *Cooley v. Board of Wardens* is, at the present time, the accepted doctrine of the Supreme Court."

In *Munn v. Illinois*, 94 U. S. 113, the question arose as to the power of the state to license grain elevators used in connection with interstate carriers, and such regulation was held not to be an interference with interstate commerce in the absence of national legislation on the subject.

(l. c. 135:)

"Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction."

In *Escanaba Company v. Chicago*, 107 U. S. 678, the power of the city to regulate the use of drawbridges over a navigable river came into question, and the decision held that although the river was under national authority, yet until Congress should act the state might control, since it was a matter local in its nature. The court there says (l. c. 683):

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

(l. c. 687:)

"On the other hand, when the subjects on which the power may be exercised are local in their nature or operation or constitute mere aids to commerce, the authority of the state may be exerted for their regulation and

management until Congress interferes and supersedes it."

(l. c. 687:)

"Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by state authority."

In *Davis v. Pennsylvania Gas Company* (Public Utility Reports, 1917 F) before the New York Public Service Commission, a proceeding had been brought to compel a reduction in the price of natural gas in New York brought into the state from Pennsylvania. The sole question was whether or not the business was interstate commerce of such a nature that the state of New York could not control the price in New York. The commission says of this business (l. c. 614):

"Has Congress intended to leave to the states affected the regulations necessary to control the trade in gas? The control of this product is not one which is of interest to the whole country. The area which produces it is comparatively small. In the same sense the distance it may be conveyed with profit is short. For commercial purposes but one method of transportation is possible—by pipe lines. The course of supply is continually changing, and varies in amount. It is used for light, heat and power under different conditions and for different purposes."



The Commission considered the decision of the case at bar in the court below at the preliminary hearing of this case and concluded that the natural gas business is local in character, and that the state should therefore have power to control the rate.

*Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, involved the transportation of natural gas from Indiana to Illinois and regulations in Indiana respecting it. On the point of the local character of the natural gas business the court said (l. c. 571):

"The local character of such a substance as natural gas is, we repeat, marked and peculiar \* \* \*. It is so essentially local that only local regulation can be effective or appropriate. \* \* \*"

(l. c. 572:)

"The local and peculiar character of natural gas makes it almost impossible that it should be the subject of a general national regulation. \* \* \* (l. c. 573.) Upon this point we affirm that natural gas is characteristically and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and peculiarities it is a proper subject for state legislation and cannot, so far as regards local protection, be made the subject of general legislation by Congress; or, at all events, that it does not require a uniform system as between the states' for its regulation."

In *Manufacturers Light & Heat Co. v. Ott*, 215 Fed. 940, the company was operating its lines in

Ohio, Pennsylvania and West Virginia, and it was held that the West Virginia Public Service Commission had authority to regulate rates to be charged in that state and such regulation was not an interference with interstate commerce which could be objected to, since Congress had expressly declined to regulate interstate gas companies.

To the same effect are

*Railroad Commission Cases*, 116 U. S. 307.  
*N. Y. N. H. & H. R. R. v. New York*, 165  
 U. S. 628.

*Minnesota Rate Cases*, 230 U. S. 352.  
*Western Union Tel. Co. v. James*, 162 U.  
 S. 650.

The natural gas business is not such as to require national legislation. Congress has expressly refused to regulate it. (U. S. Compiled Statutes 1916, Sec. 8563; 36 Statutes at Large, Chap. 309, p. 544, Sec. 7.) The express language excluding the natural gas business from the terms of the Interstate Commerce Act is conclusive of the intention of the Federal Government to leave that business open to local regulation. The business is not great in extent, considered from a national standpoint. It is carried on in Oklahoma, in Kansas and comes just across the state line into Missouri. The maximum number of meters on the entire system is 150,000. There are few other gas fields in the United States, and each field can serve only its limited local territory and has its special local problems. The business affects the use of city streets over which the cities of the state must have complete control and over which

the state of Missouri has given its cities complete control. The business touches the safety and convenience of the citizens of the state so closely that the state should have the right to protect those citizens.

**V. The decree of the court below amounts to a taking of the property of Kansas City, Missouri, without due process of law in violation of the Fifth Amendment to the Constitution of the United States.**

1. The Franchise Ordinance No. 33887 between Kansas City, Missouri, and The Kansas City Gas Company is a valid contract.

A. At the time the franchise ordinance was adopted, Kansas City had adopted a charter under the provisions of Section 16 of Article IX of the Constitution of Missouri of 1875 (for text of this section see paragraph 24 of Statement of Facts, ante) which ordains:

"Any city having a population of more than 100,000 inhabitants may frame a charter for its own government consistent with and subject to the Constitution and laws of this state," etc.

In 1887 the General Assembly passed an Act (Laws of Missouri 1887, page 42, for text of section see paragraph 26 of Statement of Facts, ante) known as the "Enabling Act," the object of which was to resolve any doubt as to whether or not the constitutional provision was self executing, and to thus allow the cities to freely avail themselves of the power granted. Under this authority Kansas City adopted a charter on May

9, 1889, which was in force at the time Franchise Ordinance No. 33887 was enacted (see paragraphs 27, 28, 29, 30 and 31 of Statement of Facts, *ante*).

**B. The power of the city to provide, by special charter, a complete system of municipal government for the regulation of its own local affairs, including use of streets by public utilities, has been many times affirmed by the Supreme Court of Missouri.**

*Sluder v. Transit Co.*, 189 Mo. 107, 1. c. 130.

*Kansas City v. Railroad*, 187 Mo. 146.

*City of California v. Telephone Co.*, 112 Mo. App. 722.

*State ex rel. v. Railway Co.*, 140 Mo. 539.

**2. The validity and binding force of this contract upon the Kansas City Gas Company was not an issue raised by the pleadings in this cause and the court had no authority to release the Kansas City Gas Company from its obligations to Kansas City thereunder.**

At no time did the plaintiff suggest by pleadings or at the trial that any attack was to be made upon the binding force of the Franchise Ordinance 33887 by which Kansas City permitted the use of its streets and the Kansas City Gas Company was bound to furnish natural gas at a certain rate. Neither did the Kansas City Gas Company raise any such issue and no issue or question was given a hearing or even raised at the trial.

The court below did in its final decree effectually nullify the rights of Kansas City under said franchise contract. The United States District

Court for the District of Kansas, having again taken control of the receivership of the Kansas Natural Gas Company in Case No. 1351 (a case in which none of the Missouri cities were parties), made a rate order raising the price of natural gas to be charged the consumers in Kansas City, Missouri (and the other cities, Joplin and St. Joseph), from 30 cents to 60 cents. Then in the final decree of the case at bar (No. 136-N) the court enjoined Kansas City and the other cities "from interfering with the plaintiff or any of said defendant distributing companies in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri." This, of course, has completely tied the hands of Kansas City and has made its franchise contract worthless to the city.

The court below, therefore, went too far in nullifying this franchise ordinance by its final decree, and thus relieving the Kansas City Gas Company of its contract obligations to the city.

**3. The decision of a court upon an issue not raised by the pleadings does not afford a hearing and is not due process of law.**

In *Reynolds v. Stockton*, 140 U. S. 254, the question was whether or not a certain judgment rendered in New York against an ancillary receiver there was valid so as to bind the principal receiver in New Jersey, and it was held that the judgment rendered in New York went beyond the pleadings in the case and hence was void. This Court said (l. c. 265):

"The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment to be conclusive upon the parties to the litigation must be responsive to the matters controverted."

In *Coe v. Armour Fertilizer Co.*, 237 U. S. 413, the question of due process arose upon the failure of the Florida statute to require specific notice to stockholders before execution could be levied against them personally upon an unsatisfied judgment against the corporation. The court discussed the question as follows (l. c. 426):

"For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional ground, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the State Constitution and the Fourteenth Amendment, into a tender of an issue of fact respecting his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. TO DO THIS WITHOUT HIS CONSENT—AND THE RECORD SHOWS NO CONSENT—IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF JUSTICE." (Capitals are ours.)

In *Windsor v. McVeigh*, 93 U. S. 274, the facts were as follows: The United States had instituted condemnation proceedings against Windsor as a rebel during the Civil War and his land was sought to be taken. He entered an appearance in the suit, but his plea was stricken out on the ground that he was a rebel, and the proceedings went through and the land was sold by the United States marshal. Plaintiff now brings suit in ejectment and defendant sets up title from the United States marshal under this sale. This Court held that defendant acquired no title because the condemnation was void as not affording the owner due process of law in that case. The language of the court in the case is very significant for our case at bar (l. c. 282):

"The doctrine invoked by counsel that, where a court had once acquired jurisdiction, it has the right to decide every question that arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application."

And at l. c. 283:

"The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor."

In *Standard Oil Co. v. Missouri*, 224 U. S. 270, the court said (l. c. 281):

"For even if a court has original jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based."

And to the same effect are the following:

Cooley on Constitutional Limitations, 7th Ed., p. 506.

Watson on the Constitution, p. 1449.

*Scott v. McNeal*, 154 U. S. 34.

*Hovey v. Elliott*, 167 U. S. 409.

*Ex parte Indiana Transportation Co., Petitioner*, 244 U. S. 456.

We respectfully urge that the judgment in this case should be reversed, and the cause dismissed as to these appellants.

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APR 15 1918

JAMES D. MAHER,  
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1917.

No.  277

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

No.  329

KANSAS CITY, MISSOURI, et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

No.  330

KANSAS CITY GAS COMPANY et al., Appellants,

vs.

KANSAS NATURAL GAS COMPANY et al., Appellees.

No.  353

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF KANSAS.

MOTION BY APPELLANTS TO CONSOLIDATE CAUSES  
AND ADVANCE.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1917.

---

No. 693

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

---

No. 816

KANSAS CITY, MISSOURI, et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

---

No. 817

KANSAS CITY GAS COMPANY et al., Appellants,

vs.

KANSAS NATURAL GAS COMPANY et al., Appellees.

---

No. 856

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
KANSAS et al., Appellants,

vs.

JOHN M. LANDON, as Receiver of the Kansas Natural  
Gas Company et al., Appellees.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF KANSAS.

---

**MOTION BY APPELLANTS TO CONSOLIDATE CAUSES  
AND ADVANCE.**

Comes now the Public Utilities Commission of the State  
of Kansas, Joseph L. Bristow, John M. Kinkel and D. F.

Foley, Commissioners, and H. O. Caster, as Attorney for the Public Utilities Commission of the State of Kansas, and S. M. Brewster, as Attorney General of the State of Kansas, being the appellants in the above entitled causes No. 693 and No. 856, and come also The City of Kansas City, Missouri, The Public Service Commission of the State of Missouri, William G. Busby, Edwin J. Bean, David E. Blair, Noah W. Simpson and Edward Flad, as the Public Service Commission of the State of Missouri, and Alex Z. Patterson, as Attorney for the Public Service Commission of the State of Missouri, and Frank W. McAllister, as Attorney General of the State of Missouri, and the Cities of Joplin and St. Joseph, Missouri, being the appellants in the above entitled cause No. 816, and respectfully show to the Court:

1. That said cause No. 693 is an appeal from the judgment of the District Court of the United States for the District Court of Kansas, First Division, dated July 5, 1917, in the case of John M. Landon, Receiver of the Kansas Natural Gas Company v. The Public Utilities Commission of the State of Kansas *et al.*, No. 136-N In Equity, in said court; that said causes No. 816, No. 817 and No. 856 are separate appeals from the final judgment of said court in the same cause No. 136-N; that each of said groups of appellants from said cause No. 136-N has taken an appeal for certain errors pertaining particularly to that group, and also for certain other errors which pertain to all of said appellants in all of said groups:

2. That in said decrees the District Court has enjoined the public officers of the States of Missouri and Kansas, and the officers and agents of more than forty cities and towns in Missouri and Kansas from in any way interfering with the rates for natural gas fixed by said court for said cities and towns, and from bringing any other suits to determine any of the matters determined in this cause and has thus made it impossible for said cities to enforce their franchise contracts with local natural gas distributing companies and has seriously embarrassed the officials of Missouri and Kansas in the performance of their public duties.

3. That the Public Service Commission of the State of Missouri has refused to exercise jurisdiction over other

matters incidental to the service of natural gas because it cannot determine until this case is decided whether or not it has jurisdiction over the matters growing out of the service.

4. That the price fixed by the United States District Court is greatly in excess of the price authorized by the public authorities of Missouri and Kansas, and upon the ultimate decision in these four appeals depends the price which 1,500,000 inhabitants of more than forty cities and towns of Kansas and Missouri will pay for natural gas.

Wherefore, these appellants respectfully pray that said above entitled causes Numbers 693, 816, 817 and 856 be consolidated and said causes be heard and considered at one and the same time, and that the said causes so consolidated be advanced for hearing on the docket of this court.

F. S. JACKSON,

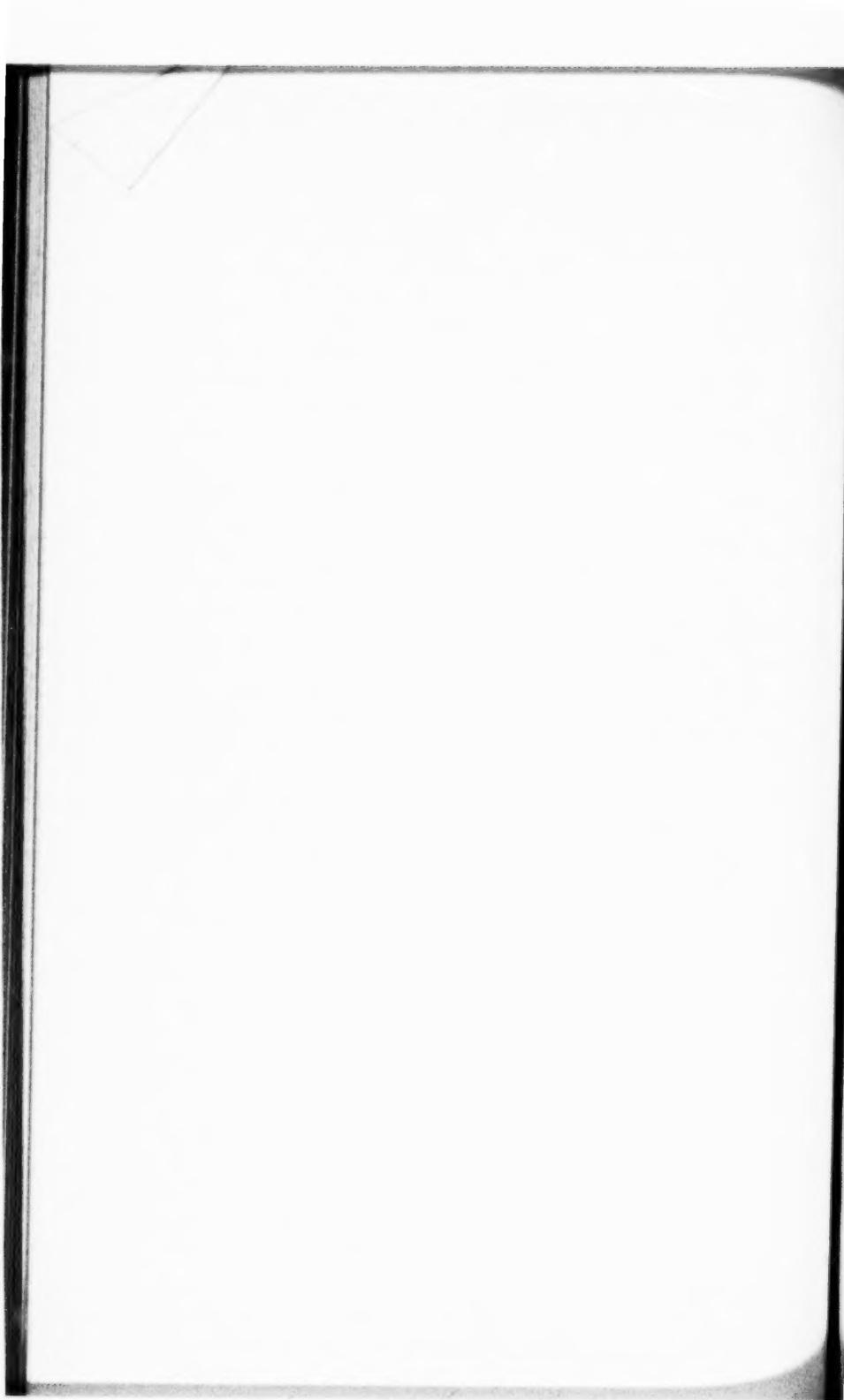
---

*Counsel for the Public Utilities Commission of the State of Kansas et al., appellants in No. 693 and No. 856.*

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*Counsel for Kansas City, Missouri, et al., appellants in No. 816.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1918.

KANSAS CITY, MISSOURI, the Public Service Commission of the State of Mis- souri et al., <i>Appellants</i> ,	} No. 329.
vs.	
JOHN M. LANDON, Receiver of the Kansas Natural Gas Company, et al., <i>Respondents</i> .	

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DIS-  
TRICT OF KANSAS.

Statement, Brief and Argument for Appellants, Public  
Service Commission of the State of Missouri,  
the Attorney-General of the State  
of Missouri et al.

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State of Missouri.  
Attorneys for Appellants.

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1918.

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KANSAS CITY, MISSOURI, the Public Service Commission of the State of Mis- souri et al., <i>Appellants</i> ,	}	No. 329.
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APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DIS-  
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Statement, Brief and Argument for Appellants, Public  
Service Commission of the State of Missouri,  
the Attorney-General of the State  
of Missouri et al.

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**STATEMENT.**

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The Kansas Natural Gas Company, a corporation organized under the laws of Delaware, is the owner of a system of pipe lines and properties employed in the production, purchase, transportation, distribution

and sale of natural gas. The lines extend from various points in Oklahoma northerly into and through Kansas, with terminals at the cities and towns of Joplin, Oronogo, Neck City, Nevada, Kansas City and St. Joseph in Missouri, and numerous cities in Kansas as well. At the points or terminals on or near the western line of Missouri, gas is delivered into the pipes of local companies operating in their respective cities and towns above named. These local companies operate under franchises granted by the cities. The local companies, or their predecessors, had written contracts with the Kansas Natural Gas Company, or its predecessors, entered into in the period of the years 1904-1906, fixing the rates and prescribing the terms under which natural gas should be supplied by the Kansas Natural Gas Company to the respective local companies. The local companies in the various cities are Missouri corporations. Receivers were appointed for the Kansas Natural Gas Company on October 9, 1912, and since that time its property and business have been in charge of Receivers.

This suit was brought on the 29th day of December, 1915, by respondents, Receivers of the Kansas Natural Gas Company, against the Public Service Commission of Missouri, the Public Utilities Commission of Kansas, the various cities in the two States wherein natural gas furnished by the Kansas Natural Gas Company was sold, and also against the local companies in the respective cities in both States selling the gas to consumers.

It was brought by respondents as the Receivers actually in charge of the property and business of the Kansas Natural Gas Company, both under appointment of the District Court for Montgomery County, Kansas, and also as potential and ancillary Receivers,

under the appointment of the United States District Court for the District of Kansas, in two suits in the latter court; one by John L. McKinney and others as plaintiffs, and another by Fidelity Title and Trust Company as plaintiff, against the Kansas Natural Gas Company.

The suit was alleged to be dependent upon and ancillary to said two last mentioned suits in the District Court of the United States.

#### THE PURPOSES OF THE SUIT.

Its purpose, so far as the Missouri defendants were concerned, was to enjoin the Public Service Commission of Missouri from interfering with rates, and the division of rates between the Kansas Natural Gas Company and the local companies, desired to be put into effect by the Receivers; and to enjoin the Commission from exercising regulatory power in respect of natural gas over the local companies in Missouri, upon the ground that the sale of natural gas by the local companies to consumers in said cities was interstate commerce.

Its purpose also was to enjoin said cities of Missouri and the local companies in them from interference with the rates desired by the Receivers, either through the enforcement of provisions of franchises held by the local companies from the cities, or by the enforcement of the provisions of contracts, between said local companies, and the Kansas Natural Gas Company, specifying rates and conditions for the furnishing of natural gas to said local companies by the Kansas Natural Gas Company. Like relief was asked against the Public Utilities Commission of Kansas, and the cities and local companies in that State.

## THE ISSUES.

All of the substantial averments constituting the underlying basis or major premise of the claim of right to relief against the Public Service Commission of Missouri, are stated by the Receivers in paragraphs 21, 22 and 23 of their bill of complaint (pages 18 and 19 of Transcript of Record), as follows:

"That in carrying on said business as aforesaid, these plaintiff receivers carry on and conduct the same by the use of instrumentalities consisting of pipelines, gas wells, compressor stations, gathering lines, feed lines, measuring stations, regulating stations, and other devices commonly used in the gas business, and that said pipelines extend from the counties of Roger, Wagoner and Tulsa in the State of Oklahoma, northerly through the counties of Washington and Nowata, in the State of Oklahoma, through the State of Kansas, and into the State of Missouri, reaching terminals at Joplin, Oronogo, Neck City, Nevada, Kansas City and St. Joseph, in the State of Missouri; that the said pipelines extending through Kansas reach the cities of Atchison, Leavenworth, Topeka, Galena, Pittsburg and Kansas City, and points intermediate between the said last named points in the State of Kansas and the Kansas-Oklahoma state line. That the gas is taken from the wells where it is produced in the states of Oklahoma and Kansas, and piped at its own natural pressure into pipelines which transport it to the main pipelines or

trunk lines extending from Oklahoma through Kansas, into Missouri. It is transported through said pipelines to the compressor stations, where it is compressed to a high pressure and made to flow freely through said pipelines by means of said compression to the next compressor station, where it is again compressed and made to flow through said pipeline to the next compressor station, where it is again compressed, and by this process of compression and recompression, it is transported through said pipelines to the consumers in the states of Kansas and Missouri. That each of said compressor stations is part of the unit system of transportation owned and operated by these plaintiffs, and are essential and necessary parts of said transportation system.

"That said pipelines constitute one complete system, which cannot be operated separately or otherwise than as one unit. That said natural gas from the time it leaves the gas wells in Oklahoma until it is delivered to the consumers in the States of Kansas and Missouri and by them consumes, is in continuous course of transportation and at no time is it stored or is its transportation suspended. That plaintiffs begin in Oklahoma such transportation of natural gas with the intent and purpose that said natural gas shall be continuously moved and transported without interruption until it is delivered to consumers in Kansas and Missouri, and the same is true of the natural gas transported from Kansas to consumers in Missouri. That

none of the natural gas transported by plaintiffs is produced in Missouri, and only 6% is both produced and delivered to consumers in Kansas.

"That the natural gas is delivered to the consumers in the several cities by plaintiffs through distributing companies under written contracts of which those set out in the files and records in cases No. 1351 Equity, and No. 1-N, Equity, of this Court are typical. That the amount paid by the consumer for natural gas purchased, as measured by his meter, is divided between plaintiffs and the distributing company in payment of the services rendered by each according to the percentages set out in the contracts above referred to, and such amount includes the original cost of the product to plaintiffs plus the cost of transportation and profits, if any.

"That of the total volume of natural gas obtained and transmitted by plaintiffs in carrying on said business, approximately 85% is obtained in Oklahoma and 15% in Kansas, and that the portion obtained from Kansas wells is piped and transmitted from said wells direct to the transporting pipelines employed by plaintiffs, and is there, and immediately upon entering the same, inextricably commingled with the gas from Oklahoma wells, and cannot be thereafter separated or distinguished from the same; nor can such Kansas gas be controlled without interfering with the control and management of said Oklahoma gas, which is transmitted through and by means of said pipelines

from the wells in Oklahoma in one continuous and uninterrupted journey to the consumers in Kansas and Missouri.

"These plaintiffs further say that the business carried on and conducted by them as and in the manner aforesaid, is the carrying on of the business and commerce among different states of the Union, to-wit, Oklahoma, Kansas and Missouri, and is exclusively under the control of the Congress of the United States, as confided to it by Section 8 of Article I of the Constitution of the United States, and is not subject to control, regulation or interference by the states of Kansas, or Missouri, or their officers."

This sets forth the essential claim of the Receivers in the case; that the passage and consumption of natural gas, through and at the tips of the burners of the individual consumers in said Missouri cities, is interstate commerce, over which the Public Service Commission of Missouri has no control.

Upon the foregoing basis, the Receivers set the farther allegation or minor premise in pleading and evidence offered, that the Public Service Commission of Missouri had suspended or undertaken to suspend, by orders made or threatened to be made by it, schedules of increased rates for natural gas, filed with the Commission by the local companies operating in the various Missouri cities above named, and was by said orders undertaken to interfere with interstate commerce, and with the establishment and collection of reasonable rates, or proportions of the same, demanded by the Receivers in said cities.



It was alleged that the Public Service Commission of Missouri, upon a hearing, had made an order canceling a schedule of increased rates for natural gas filed by the St. Joseph Gas Company, and that the Commission had suspended, under the provisions of Section 70, of the Public Service Commission Law of Missouri, before a hearing and pending an injury as to their reasonableness, schedules of increased rates filed by the local companies at Oronogo and Carl Junction, Missouri.

Section 70, of the Public Service Commission law of Missouri, provides that when a schedule of increased rates for gas is filed with the Commission, it may, upon protest filed, or of its own motion, suspend for a period of one hundred and twenty days, the putting into effect of the new rates, and enter upon a hearing as to their reasonableness, and may also, pending said hearing, and for the purpose of completing the same, suspend such rates for a further period not exceeding six months.

Said Section 70 is set out in full in the appendix hereto at page 60.

The answer of the Missouri Commission alleged that the schedules of the Oronogo and Carl Junction Gas Companies, had been voluntarily withdrawn by said companies. It alleged that the action of the Commission as to the schedule of the St. Joseph Gas Company, was based upon substantial evidence produced upon a full hearing. It set up the provisions of Sections 111, 112, 113 and 114, of the Missouri Public Service Commission Act, which provide proceedings for review in the courts of the orders of the Commission.

These sections are set out in full in the appendix, pages 61-67.

The answer of the Missouri Commission also pleaded that the defendant's local distributing companies, for themselves, and not as the agents of the Receivers, or the Kansas Natural Gas Company, were furnishing gas to Missouri consumers under contract originally made with the Kansas Natural Gas Company or its predecessors, and that since their appointment, the Receivers, the plaintiffs, had been furnishing gas to said local companies under the terms of said supply contracts.

A hearing of the case upon plaintiffs' application for a preliminary injunction, was had before the enlarged court of three judges. Their decision appears in 234 Federal, 152. In that proceeding, on June 3, 1916, a preliminary injunction was granted against the Public Utilities Commission of Kansas, as having established a rate for natural gas spoken of as the "twenty-eight cent rate," which the court found to be confiscatory. It was also there found that no sufficient grounds existed at that time for the issuance of an injunction against the Public Service Commission of Missouri. It was said that the schedules of the Oronogo and Carl Junction companies had been voluntarily withdrawn; that the Receivers were not parties to the proceedings before the Commission against the St. Joseph Gas Company; and that there was nothing to prevent the Receivers from collecting as before, from the local company, their proportion of the rate provided for by the contract between the Kansas Natural Gas Company and the said St. Joseph Gas Company.

Afterward, at various dates in August and September, 1916, certain of the local companies filed with the Missouri Commission, schedules or notices of increased rates for natural gas, above those mentioned

in their supply contracts, and the Missouri Commission made orders of suspension of said schedules, in accordance with the provisions of said Section 70 of the Public Service Commission Act of Missouri, as pending an inquiry into the reasonableness of the proposed new rates.

The Kansas City Gas Company also made application to the Commission to file a schedule of rates to an amount and to take effect at a time as provided by the franchise ordinance of Kansas City, Missouri, granted to the said Kansas City Gas Company, and in accord also with the supply contract between the Natural Gas Company and the local company.

Afterward, and before the final hearing in the cause, plaintiffs filed their supplemental bill, which appears at page 343 of the printed transcript. In this supplemental bill, among other things, it was alleged that the Kansas City Gas Company had filed with the Public Service Commission of Missouri a new schedule of rates for natural gas in Kansas City, Missouri. Under this proposed schedule, the rates were to be those, and they were to take effect at the time specified in the franchise ordinance. It was alleged that Kansas City, Missouri, through its City Counselor, had consented to the filing of said application and schedule, and that the Public Service Commission of Missouri, by its order, had permitted the same to be filed.

The rate—30 cents per thousand cubic feet mentioned in said schedule—while in accordance with the rate fixed by the franchise ordinance, was different from that promulgated by the Receiver to be effective in Kansas City, Missouri. The supplemental bill also alleged the filing with the Missouri Commission, by certain local companies, of new schedules of rates

for natural gas purchased from the plaintiff, and intended to be put into effect by the local companies in response to and in accordance with new charges for natural gas promulgated by the Receiver to the local companies.

These new schedules were alleged to have been filed, and were filed by companies operating in the towns and cities of Joplin, Oronogo, Carl Junction and Nevada, Weston and St. Joseph, Missouri. It was alleged, and it appeared, that in each instance, upon the filing of a new schedule, the Public Service Commission of Missouri made an order in accordance with the provisions of section 70 aforesaid of the Public Service Commission Law of Missouri, whereby it declared said new schedules suspended pending and for the purpose of an inquiry to be made into the reasonableness of said new rates. The period of suspension in each case was for one hundred and twenty days.

In each case, the rate thus proposed for consumers was in excess of the rates fixed by the respective supply contracts or franchise ordinances held by the local companies, and was a rate designated in response to the demands of the Receivers for an increase.

It was alleged that these orders of the Public Service Commission of Missouri were an interference with interstate commerce, and an undue burden upon the same.

Defendants, appellants here, the Public Service Commission of Missouri, and the Attorney-General of Missouri, filed answer to the supplemental bill of the Receivers. The answer is shown at page 424, printed Transcript.

In this answer to the supplemental bill, the appellants (page 427, printed Transcript), alleged

that the enlarged court had expressly withheld the expression of any opinion as to the validity of the various city ordinances, contracts between the cities and distributing companies, and contracts between the distributing companies and the Natural Gas Company, or as to the obligations of the Receiver under them.

The answer denied that any of the local companies in Missouri were the agents of the Receiver or of the Kansas Natural Gas Company, or that any of said local companies, in the sale of natural gas to consumers, were engaged in interstate commerce. The answer alleged in respect of each of said local companies in Missouri, filing a new schedule, respectively, that the local company was an independent domestic corporation organized under the laws of Missouri, which purchased from the Receiver, or, from the Kansas Natural Gas Company, the natural gas distributed by it to its consumers.

The Public Service Commission of Missouri permitted these orders of temporary suspension to expire without proceeding to a hearing or attempting to enforce them, because, while no writ of injunction had actually issued against the Commission at that time, it was withheld by the statement from the bench of the judge sitting in the case that the court, pending trial and final decision, would deal with any attempt at interference with the collection of rates for natural gas which the court's Receiver, under instruction from the court, had promulgated. The hearing of the evidence consumed much time, and it is readily conceivable that it was not the desire of the Public Service Commission of Missouri to enter into an unseemly controversy with the court in collateral actions, but that its purpose was to await a decision

on the essential questions involved, in due course, in the main case.

The case as to the Kansas defendants was decided first. The decision was handed down April 21, 1917, and is reported in 242 Fed. at page 658. The opinion of the court is also found at page 563 et seq. of printed Transcript herein.

The case against the Missouri defendants was decided August 13, 1917. The court in the memorandum opinion handed down at that time, stating its final conclusions, and, particularly disposing of the case of the Missouri defendants, set forth in a concise way the court's view of the material issues concerning the Missouri defendants, and the nature of the relief sought and to be adjudged against them, as follows (Pages 616-617, printed Transcript):

"The principal issues in which the Missouri defendants are interested involve two main questions. First, whether the acts of the Missouri Commission and of the Missouri defendants or of certain of them have been of such a character as to call for an injunction against them on behalf of the Receiver. That question resolves itself into two subordinate questions: (a) Whether the business which is being carried on by the Receiver, viz.: The transportation of natural gas from Oklahoma and sale thereof in Missouri constitutes interstate commerce; (b) whether the acts of the Missouri Commission or any of them can be held to be acts which in effect deprive the Receiver of the property of the company without due process of law. The second main question and one in which not only the Missouri defendants but also the

Kansas defendants are interested, is the question as to the status of the supply contracts originally made by the Kansas Natural Gas Company or its predecessor with various distributing companies or their predecessors. This question again is divisible into two subordinate questions: (a) As to the status of the supply contracts as between the original parties or their assignees, and (b) the status of the supply contracts as to the receiver. The relief sought by the Receiver is:

"First, by way of injunction against the defendants, and especially against the Missouri Commission, restraining them from interfering with the carrying on of the business of transportation and selling of natural gas from Oklahoma into Missouri. The claim of the plaintiff is that the business thus carried on is interstate commerce, and that the Missouri Commission and some of the other defendants have attempted to unduly and directly burden this interstate commerce and to place restrictions upon it; and further it is claimed that the acts of the Missouri Commission in effect take away the property of the Receiver without due process of law. Secondly, by way of injunction as against all of the defendants to prevent them or any of them from instituting any suits or proceedings or taking any steps without the consent of this court to enforce the provisions of the so-called supply contracts, which they claim, or which some of them claim, are still in force as against the Receiver; the Receiver claiming: (1) that these supply contracts

were invalid in their inception; (2) that even if they were valid yet, nevertheless, by reason of the changed circumstances, and by reason of the provisions in the contracts themselves looking towards a change of circumstances, they are no longer binding upon the original parties to these contracts; (3) that even if the contracts were valid in their inception and still are existing valid contracts between the original parties, yet they are not at this time binding upon the receiver."

#### THE PUBLIC SERVICE COMMISSION OF MISSOURI.

The Public Service Commission of Missouri was created by an act known as the Public Service Commission Law, approved March 17, 1913, Laws of Missouri, 1913, pages 556-651, and amendments, Laws of Missouri, 1917, pages 432, 441.

The sections of the law prescribing the powers and duties of the Commission, and especially those having to do with the subject of control and regulation of gas companies, the sale and distribution of gas, natural and artificial, and the rates therefor, are printed in the appendix hereto, and particular reference will be made to them as occasion requires.

#### GAS COMPANIES IN MISSOURI.

Companies formed in Missouri for the purpose of supplying gas, electricity or water to cities and their inhabitants, are organized under general corporation laws, and particularly the provisions found in article VII, of chapter 33, Revised Statutes of Missouri, 1909, among which is section 3367, as follows:



*"Gas, electricity and water companies, powers of.*—Any corporation formed under the provisions of this article, for the purpose of supplying any town, city or village with gas, electricity or water, shall have full power to manufacture and sell, and to furnish such quantities of gas, electricity or water as may be required in the city, town or village, district or neighborhood where located, for public or private buildings or for other purposes; and such corporations shall have the power to lay conductors for conveying gas, electricity or water through the streets, lanes, alleys and squares of any city, town or village, with the consent of the municipal authorities thereof, and under such reasonable regulations as said authorities may prescribe."

The Kansas Natural Gas Company never had any franchise, right or license to use or occupy the streets of any of the Missouri cities above mentioned, nor did it have any interest in any of the local companies operating in said Missouri cities. (Page 806, printed Transcript.)

Authority for the sale in Missouri cities of natural gas furnished by the Kansas Natural Gas Company came from the cities by way of franchise ordinances or licenses granted to the local companies owning plants in said cities. The rates to be charged were fixed for definite periods by ordinance or contract with the local companies in their respective cities. These franchises or licenses grew out of the existence of contracts spoken of as "supply contracts" between the local companies and the Kansas Natural Gas Company or its predecessors, whereby the Kansas Natural

Gas Company agreed to sell and the local companies agreed to buy from it, upon certain specified terms, natural gas for the use of the consumers of the local companies.

Natural gas is sold in Kansas City, Missouri, under an ordinance of that city passed September 27, 1906, granting that right to Hugh J. McGowan and others, predecessors of the Kansas City Gas Company (page 382, Transcript), and under a supply contract between the Kansas City Pipe Line Company, predecessor of the Kansas Natural Gas Company and said Hugh J. McGowan and others. (Page 844, Transcript.)

Under section 13 of said ordinance, the price at which natural gas should be sold to consumers in Kansas City was fixed at twenty-five cents per thousand cubic feet during the first five years of its sale; at twenty-seven cents per thousand cubic feet during the second period of five years; and at thirty cents per thousand cubic feet thereafter during the remainder of the thirty year term of the ordinance.

Under the terms of said supply contract, it was provided among other things (page 846, Transcript) that:

"So long as the party of the first part is able to supply the same, the parties of the second part agree to *buy* from the party of the first part all the gas they may need to fully supply the demand for domestic consumption in the said city and to pay to the party of the first part for the natural gas which they shall receive from said party of the first part for all purposes during the first two years a sum equal to sixty per cent of their gross receipts from the sale of such natural gas in said city of Kansas City, Missouri, and

thereafter a sum equal to sixty-two and one-half per cent of such gross receipts."

Supply contracts of a similar nature were made by the predecessors of the Kansas Natural Gas Company with the local companies operating respectively in the cities and towns of Joplin, St. Joseph, Nevada, Oronogo and Carl Junction, Missouri (page 787, Transcript), and in all of said cities progressive rates were prescribed by franchise or contract for certain periods, substantially as in Kansas City.

It was and is the contention of the Public Service Commission of Missouri that all of said supply contracts were contracts of purchase and sale, and that under the terms of said contracts, and under the methods employed both by the Kansas Natural Gas Company and the Receivers, there was and is an absolute sale and delivery of natural gas by the Kansas Natural Gas Company or its Receivers to the local companies. On the other hand, the theory of the Kansas defendants, based upon the statute of that State, was that the local companies there were agents of the Kansas Natural Gas Company.

#### NO NATURAL GAS PRODUCED IN MISSOURI.

"None of the natural gas furnished by the Receiver is produced in Missouri; a small percentage, not exceeding 6% thereof is produced in Kansas, and the greater portion thereof is produced in Oklahoma. Approximately 44% of the gas furnished by the Receiver is sold in Kansas, and 56 per cent is sold in Missouri "

(Paragraph 54 statement of the evidence, page 807, printed Transcript.)

*The nature, manner of transportation and of sale of natural gas.*

These matters, essential in the consideration of the case, can best be shown here as they are given in that part of the statement of the evidence approved by the Court, appearing at pages 808 to 816 printed Transcript, including all, or parts, of paragraphs 61 to 83 of said statement:

"61. The production, transportation, distribution and sale of natural gas was and is accomplished in the following manner:

"The Kansas Natural Gas Company and its receivers acquire the gas by drilling, purchase and otherwise in southern Kansas and in Oklahoma and collect it into pipe lines. The gas is caused to flow from the wells into the gathering lines of the Kansas Natural Gas Company by the force of "rock pressures" which are the pressures at which gas is found in place in the earth, varying from 15 pounds to 500 pounds per square inch. These initial pressures carry the gas along in the pipe lines for some distance and then the pressures become lower and in order to carry the gas farther it is necessary to pass it into compressor stations where, by means of engines, the gas is compressed and raised to a pressure of approximately 300 pounds per square inch. Emerging from the compressors, the gas flows along the pipe lines by reason of the increased pressure, toward the next compressor station which it reaches at a reduced pressure; it is again compressed and sent forward, which process continues till the gas reaches the distributing system or gas holders of the Kansas City Gas Company, or other local gas company. The

whole process is merely the application of the law of flowing gases from a given pressure or density to a lower pressure or density.

"62. There is a permanent physical connection between the pipe-lines operated by the Kansas Natural Gas Company and its Receivers and the distribution mains of the local companies at or near the corporate limits of the various cities in which said companies are doing business, through which natural gas passes from said pipe-line system into said distributing systems.

"63. Gas is constantly moving from the wells into the gathering mains and along the pipe-line system night and day; and the compressors are constantly at work night and day compressing gas into the trunk main system; during the night and certain hours of the day during certain warm days more gas passes into and is compressed into trunk main system than is being taken out for use. The amount of gas in the pipe-line system at any particular time depends upon pressure and is apportioned to absolute pressure, which absolute pressure is atmospheric pressure, 14.4 plus pressure produced by mechanical processes. The process of filling the lines in excess of demand during the night time and warm days and certain hours of the day is called 'packing the lines.'

"64. Mr. Alfred Hurlburt, Engineer for the Kansas City Gas Company testified that that the pipe-line system of the Kansas Natural Gas Company constitutes not only a transportation system but a great storage

reservior by means of this packing of the lines; that the storage capacity of the lines of the Kansas Natural Gas Company from Grabham, Kansas, to Kansas City, Missouri, amounts to 12 million cubic feet in addition to the carrying capacity of the lines; that both the carrying capacity and the storage capacity of this system are requisite and necessary for the proper supply of gas by the Kansas Natural Gas Company and its Receivers to the Kansas City Gas Company; that if it were not for the storage capacity of the Kansas Natural Gas Company's lines, the Kansas Natural Gas Company and its Receivers would not be able to supply the instantaneous demands of the consumers upon the Kansas City Gas Company at times when the demands are greatest for the reason that such instantaneous demands at maximum-demand-hours of the day always exceed the carrying capacity of the lines and the storage capacity must be drawn upon; that all gas is in constant motion and even if enclosed in a holder it cannot be held still, that is, the nature of gas is constant molecular motion; that there is a constant movement of gas in the pipelines, the general direction of which is from the gas sands of the wells toward the consumers' appliances; and that gas, unlike solids, oils and other liquids, can be greatly compressed.

"65. S. S. Wyer, Consulting Engineer, who made an affidavit in the preliminary hearing known as plaintiff's Exhibit No. 2, and made a report to the Federal Receivers

in suit No. 1351, equity, and several other affidavits that were used both in the preliminary and final hearings, testified for the plaintiff in substance, as follows:

"Gas passes from the well tubing, where found, out to the conveying lines, then to the measuring stations and to the various compressing stations, through the main line measuring stations at the gates of the town and then through the medium of the pressure lines of the town; then through the low pressure line of the town to the gas service cocks and the gas service lines to the consumers' pipe and ultimately fixing its final destination at the burner of the consumers' fixtures. It requires all of these pipe lines, those of the Kansas Natural, the distributing company and the consumer to complete the system. All of them are essential to the transmission of gas from Kansas or Oklahoma to the consumers in Missouri. Gas is a fluid composed of a large number of molecules which are vehicles of energy continually in motion, and having an inherent tendency to get farther and farther apart. The range of motion of the molecules is limited only by the volume of the closed containing vessel in which they constantly move to and fro. The most distinguishing characteristic of gas is its universal property of completely filling an enclosed space.

"Natural gas is a highly combustible gas made by a secret process of nature. It is not a chemical compound but is a mechanical mixture of several gases, the number

and proportion of the various constituents varying somewhat with different localities and at individuals wells. Gas pressure is the result of the combined efforts of all of the moving molecules in the mass trying to get farther and farther apart. Being restrained in the container it exercises a pressure against the walls of the vessel. The pressure is the same in all directions on equal areas of surface. With a given mass of gas any increase in the volume of the containing vessel will give the molecules more range of motion and thereby lower the pressure. So if part of a given mass of gas is removed from a reservoir the remaining mass of gas will expand instantly and keep the reservoir filled, but at a lower pressure.

"In the transportation of natural gas from the gas stand to the ultimate consumer the gas is never at rest but is a constantly seething, moving mass between the gas stands in the fields and the consumers' fixtures in the various cities

"When the line is operated at its fullest capacity the gas will move at a greater velocity than the fastest express train. The gas can only go in one direction at the same time when flowing through a given pipe. The gas is compressed at compressor stations and is thus forced from the field to the point of consumption. At the intake of the line the pressure must be large and at the discharging end of the line the pressure should be relatively low. There is no delivery until the gas has not only passed through the con-



sumer's meter but is burned at the consumer's fixtures. Each distributing plant is simply one of the integral transportation system as a whole. There is no delivery beginning at the consumer's pipe line to the service pipe

"In making a comparison between the transportation of railroad and the transportation of natural gas by pipe lines, the receiver of the goods in the railroad shipment corresponds to the ultimate consumer of the natural gas. There is no other feasible way of transporting natural gas except by this system or method of pipelines. The continuous movement of gas in the pipes is caused by the expansion power of the gas produced originally by natural rock pressure and as that pressure declines, it is supplemented by gas compressors along the main transportation line. In the system of the Kansas Natural Gas Company, the movement is always from Oklahoma north through Kansas into Missouri.

"The demands on the pipe line vary very largely with the hours of the day. Gas being compressible, if the compressor stations are operated practically uniformly, that is, with a practical uniform rate, then during certain periods of the day when the consumption is less than the output at the compressing station may be made to do what in the natural gas man's parlance is known as "packing the lines," which will result in a limited storage capacity in the line. This is inevitably connected with the transportation of gas and if it were not present transportation of gas could not be made with the

present size of the Kansas Natural pipe line system.

"During such periods of the day as the natural gas flow is below the normal, service gas may be by-passed into a storage holder, and then it may be removed from the holder during the peak-load-demand in order to take care of the peak-load-demand at the distributing plant. This is not necessary so far as the transportation of gas is concerned, but is useful to improve the service rendered by the distributing company. Ordinarily the percentage of gas thus flowing through a holder is relatively small. Such holders are not generally used in the transportation and delivery of natural gas. Such holder is not a part of the transportation of gas but is a mere incident and is merely a part of the distribution. Storage might be compared to the milling of grain in transit, or the feeding of cattle in transit, or the compressing of cotton in transit. It might also be compared to water standing in an irrigation ditch.

"The Kansas Natural has a 16 inch main running from Petrolia to Kansas City, 110 miles long. The mean pressure is 250 pounds. The storage capacity of that would be 14,634,620 cubic feet. If there is a delivery of 70 million cubic feet a day from this pipe line it would have to be filled and emptied five times during the day.

"On cross examination by Mr. Dana, Mr. Wyer was asked and made answer as follows:

"(Mr. Dana:)

" 'Q. Mr. Wyer, assuming that the natural gas lines are full of gas and that the lines of the distributing system are full of gas and the consumer's house pipings are connected, how long after the consumer decides to buy a thousand feet of gas does he get it?

"(Mr. Wyer:)

" 'A. He gets it instanter, that is, if the service is operating and the gas is going. He gets it by simply turing a cock.

"(Mr. Dana:)

" 'Q. He gets it instanter?

"(Mr. Wyer:)

" 'A. Yes, sir.

On redirect examination by Mr. Long, Mr. Wyer was asked and made answer as follows:

"(Mr. Long:)

" 'Q. That is incidental to the transportation of natural gas?

"(Mr. Wyer:)

" 'A. Yes, sir!"

"66. The gas passes into the mains of the distributing plant of the Kansas City Gas Company at 25th Street in Kansas City, Missouri, about 600 feet east of the Missouri-Kansas state line and at 39th Street in Kansas City, Missouri, about one foot east of the said state line. After the gas enters the mains of the Kansas City Gas Company, that company has the actual physical possession and complete control over it and over its distribution and sale. After reach-

ing the main system of the Kansas City Gas Company, the gas is passed through governor stations which reduce its pressure to a uniform pressure of about 8 inches water column necessary for convenience and safety in distribution and sale. No gas is ever returned from the Kansas City Gas Company to the Kansas Natural Gas Company.

"67. When a surplus of gas is available in the lines of the Kansas Natural Gas Company, the Kansas City Gas Company fill its own gas holders, having a capacity of 7,000,000 cubic feet, from the mains, and holds this gas in storage until such time as the Kansas Natural Gas Company cannot deliver enough gas to supply the demand, at which time the gas in the holders is pumped by the Kansas City Gas Company through its mains into its governor stations, and thence into and through its low pressure distributing system to its consumers. The period during which the gas remains in the holders thus stored, varies from a few hours to several days or weeks, according to the demand and supply. During the present hearing of this case, gas has thus been used from the holders in Kansas City, Mo. (Transcript, p. 75, 76.)

"6810 Nearly half the gas distributed by Kansas City Gas Company in June, 1917, went into the holders and was pumped out again by the Kansas City Gas Company. The holders were used during every month of the year 1917 up to the time of the hearing of this case (July). The storage holders are not a necessary part of the pipe-line system

for the transportation of gas from the Kansas Natural wells to the consumers (Transcript, 137, 138). When the gas comes from the holders of the Kansas City Gas Company it has to be compressed by that company in order to put it through the mains (Transcript, 115.)

"69. A consumer in Kansas City, Mo., who wishes to procure natural gas makes written application therefor to the Kansas City Gas Company and complies with certain reasonable rules prescribed by that company. If accepted within a few hours or within a day or two, according to circumstances, the gas is turned on for the consumer by the Kansas City Gas Company. The consumer's meters are read, bills made and presented to them, and if not paid, gas is turned off, all by the Kansas City Gas Company without consultation with the Kansas Natural Gas Company or with its Receivers. The form of such application is incorporated herein, par. 85.

"70. The 'consumer's meter' belongs to the Kansas City Gas Company and is generally located in the cellar or basement of the consumer's premises. The consumer is charged by the Kansas City Gas Company for all gas that passes through that meter whether it reaches the burner tip or not, and the consumer is required to pay for it except only in the event that he is insolvent and cannot be made to pay. If, after gas passes the consumer's meter, any of it escapes through leaks in the consumer's pipes, the consumer must pay for it.

"71. The consumer receives gas for approximately thirty days before his meter is read. Ten days thereafter he is presented with bill (Exhibit 1015) and ten days thereafter he makes payment therefor in cash or by check, to the Kansas City Gas Company at 910 Grand Avenue, Kansas City, Missouri. The form of bill is incorporated herein, par. 85.

"72. The Kansas City Gas Company exercises its own judgment and discretion as to extending credit to consumers, without consultation with the Kansas Natural Gas Company or its Receivers (Transcript, p. 81). It requires a cash deposit from some; it accepts guarantees from others and those having credit it supplies without either deposit or guarantee. It discontinues the supply of gas to consumers who default in payment of bills for a certain period of time and for certain other violations of its rules and regulations according to its own discretion.

"73. There are no relations or dealings between the consumer in Kansas City, Missouri, and the Kansas Natural Gas Company or its Recievers; or between the City of Kansas City, Mo., and the Kansas Natural Gas Company or its Receivers, except such, if any, as might be construed to arise or to be created by operation of law from the terms of said supply-contracts and franchise-ordinances and the course of dealing herein stated or any or all of the same.

"74. The Kansas City Gas Company does not forward to the Kansas Natural Gas Company any list of the names of consumers

or the amount of gas required by all or any of them at any future time. The Kansas City Gas Company has paid to the Kansas Natural Gas Company, or its Receivers 61- $\frac{1}{2}$  per cent of its gross receipts from the sale of gas. When bills were not collectible the amount of such bills were not figured in determining the payment due the Kansas Natural Gas Company or Receivers. It has been the practice for the Kansas City Gas Company to furnish the Kansas Natural Gas Company or Receivers annually a list of the names and amount due from delinquent consumers; and if later they paid their bills, the names of such consumers thus paying, were furnished to the Kansas Natural Gas Company, to enable that company to check up the two lists and thus determine whether or not it was receiving the amount due it.

"75. Payments by the Kansas City Gas Company and the Wyandotte County Gas Company to the Kansas Natural Gas Company and Receivers have been made on the 15th day of each month for the gas sold to consumers and collected for prior to about the tenth day of the preceeding month. Since September 1, 1916, the Receiver has rendered bills to The Wyandotte County Gas Company and the Kansas City Gas Company for gas claimed to have been delivered by the Receiver at the points of connection at or near the city limits, between the mains of the Wyandotte County Gas Company and the Kansas City Gas Company and pipe-line system operated by the Re-

ceiver, and the Kansas City Gas Company, and The Wyandotte County Gas Company have not paid said bills, but has paid on the basis of the supply-contracts and the Receiver is now prosecuting claims against said companies for gas on the basis of measurements and deliveries at the city limits, as shown by the allegations and exhibits to plaintiff's supplemental bill and the Kansas City Gas Company's and the Wyandotte County Company's answers and amended and supplemental answers on file.

"76. The Kansas City Gas Company and the Wyandotte County Gas Company have carried on their business in substantially the same manner in all material respects and have pursued the same course in their dealings, transactions and communications to and with the Kansas Natural Gas Company, the Receivers and their respective consumers.

"77. The demands of the consumers of the Kansas City Gas Company during the summer months are approximately 10,000,000 cubic feet per day and during the winter months for lighting and cooking approximately 13,000,000 cubic feet per day and for all purposes, if demands were met approximately 70000,000 cubic feet per day. During the winter of 1916-17 the greatest available supply on maximum-demand-days for Kansas City, Missouri, was 12,000,000 cubic feet for all purposes.

"78. The rates charged by the Kansas City Gas Company and paid by its consumers prior to November 19, 1916, and at all times



thereafter up to the time of the fixing of a rate by Judge Booth were those named in Ordinance No. 33887 of Kansas City, Missouri (Exhibit 1009).

"81. The St. Joseph Gas Company maintains a manufacturing plant for the manufacture of artificial gas for the purpose of supplying any deficiency in the supply of natural gas. The natural gas delivered by the Kansas Natural Gas Company to the St. Joseph Gas Company is mixed with the artificial gas which that company produces and the mixture is sold at a higher rate than that charged for natural gas alone, the rate depending upon the percentage of artificial gas which is, in any given month, put into the mains with the natural gas. That settlements by said St. Joseph Gas Company with the Kansas Natural Gas Company or the Receiver are based on the readings of the consumers' meters. That said city of St. Joseph passed no ordinance governing the sale of natural gas and is not a party to the contract between the St. Joseph Gas Company and the Kansas Natural Gas Company.

"82. The Kansas City Gas Company has filed with the Public Service Commission of the State of Missouri a petition for authority to supplement natural gas with manufactured gas and fix the price thereof. Said petition is incorporated herein, par. 85.

"83. The foregoing statement as to the manner of the transportation, distribution, delivery and sale of natural gas applies in all

substantial respects to the defendant Cities  
of Missouri.”

### THE FINDINGS AND CONCLUSIONS OF THE COURT.

Upon the foregoing the court found and decreed;  
First; That the sale to consumers in Missouri cities  
of natural gas furnished by the Receiver was inter-state  
commerce. Second: That the Public Service Commis-  
sion of Missouri had made no orders fixing general rates  
for the sale of natural gas by the Receiver, as had been  
done by the Kansas Commission, but that the acts  
of the Missouri Commission in making orders sus-  
pending new schedules of rates filed by the local com-  
panies, and its threats to enforce said suspending  
orders and to defer the establishment of said schedules  
for a period of one hundred and twenty days or longer,  
constituted attempts to directly interfere with and  
directly burden interstate commerce. Third: That  
the provisions of Section 69, Subdivision 12, and  
Section 70 of the Public Service Commission Act of  
Missouri, providing for the suspension by the Commis-  
sion of the enforcement of natural gas schedules, and  
the construction placed upon said sections by said  
Missouri Commission, and the acts of the Commission  
thereunder, constituted the taking of the property of  
the Receiver and of the local companies without due  
process of law, and without just compensation, and were  
a denial of the equal protection of the laws. Fourth:  
That the so-called “supply contracts” were not binding  
upon the Receiver; but expression of opinion was with-  
held as to whether said contracts were originally valid  
or invalid. (Page 615-Page 621, Vol. II, Record).

Thereupon, the court granted its permanent injunction against these appellants, enjoining and restraining them from making or attempting to make, or attempting to enforce in any manner any orders affecting or interfering in any way with rates for natural gas established by the Receivers and said local companies.

And from the aforesaid decree of the court, the defendants, Public Service Commission of Missouri, and Frank W. McAllister, Attorney-General of Missouri, together with the defendant cities, Kansas City, St. Joseph and Joplin, Missouri, obtaining jointly an order of severance from their co-defendants, were allowed an appeal in this cause.

With their appeal, the appellants, Public Service Commission of Missouri, and the Attorney-General of Missouri, filed their assignment and also their amended assignment of errors.

The final assignments of errors so filed, are as follows: (Page 757 Record.)

# I

"The said District Court for the District of Kansas erred in said cause in holding upon the final hearing thereof, that the business transacted by the plaintiff, that is to say, the transportation of natural gas from Kansas and Oklahoma to Missouri and the distribution and sale of said gas in the State of Missouri by plaintiff and the distributing companies selling natural gas in the defendant cities of Missouri above mentioned, is interstate commerce of a national character and not of a local nature, for the reason that

the sale of natural gas in Missouri is a business of a local nature and not of a national character, and is not interstate commerce.

## II

"The said District Court for the District of Kansas erred in the trial of said cause below upon the final hearing thereof, in holding that the orders of the Public Service Commission of Missouri suspending rates and schedules for natural gas filed by local distributing companies, and the order approving and establishing a new rate for natural gas in Kansas City, and the threats of said Public Service Commission and of its Counsel to make other and similar orders, are attempts directly and unduly to burden and regulate interstate commerce, and therefore unauthorized and void; for the reason that said orders are a regulation of and effect intrastate commerce within the State of Missouri only, and are within the powers of the Public Service Commission of Missouri to make.

## III

"The said District Court for the District of Kansas erred in the trial of said cause below upon the final hearing thereof in holding that the Public Service Commission Act of the State of Missouri and particularly Section 69, subdivision 12, and Section 70 thereof authorizing said Commission to suspend the enforcement of natural gas rate

schedules filed with said Commission, and defer the use of rates, charges, forms of contract and agreements for a period of 120 days beyond the time when such rates, charges, forms of contract and agreements would otherwise go into effect; and further authorizing said Commission to extend the time of suspension for a further period of six months, and further providing that no change shall be made in rates, charges, forms of contract or agreements established after thirty days' notice to the Commission and publication thereof for 30 days by order of the Commission, together with the construction placed upon said Public Service Commission Act by said Commission, and the acts and proceedings of said Commission thereunder, in suspending schedules filed by local distributing companies in the defendant Missouri cities fixing the price of natural gas to consumers, constitute the taking of the property of the plaintiff and said distributing companies above named without due process of law, and without just compensation, and deny to the plaintiff and said distributing companies the equal protection of the laws, all in contravention of the Constitution of the United States, for the reason that the provision of said Public Service Commission Act allow to plaintiff and the distributing companies an opportunity to be heard in due course of law, and said business is intrastate and within the jurisdiction of said Commission.

## IV

"The said District Court for the District of Kansas in the trial below, upon the final hearing thereof, erred in enjoining these appellants from interfering with the plaintiff, or any of the said defendant distributing companies in the State of Missouri, in establishing and maintaining such rates as the said District Court has approved or may hereafter approve for consumers of natural gas in the State of Missouri, for the reason that natural gas is sold to consumers in Missouri only by local companies incorporated under the laws of the State of Missouri, operating under franchises granted by the cities under ordinances and permits of the municipal authorities, and conducting, in the sale of natural gas to the consumers, a business of a local character, over which the Public Service Commission of the State of Missouri has exclusive jurisdiction and power of regulation.

## V

"The said District Court for the District of Kansas erred in the trial of the case below upon the final hearing of the case thereof in granting the prayer of the Kansas Natural Gas Company, defendant herein, for a permanent injunction against the Public Service Commission of Missouri upon the ground of interference by said Public Service Commission of Missouri with interstate commerce

in the sale of natural gas in Missouri, for the reason that the sale of natural gas in the State of Missouri is intrastate commerce and within the exclusive jurisdiction of appellants' Public Service Commission of Missouri.

## VI

"The said District Court for the District of Kansas erred in the trial of the case below upon a final hearing thereof in granting to the defendant, Geo. F. Sharitt, the Receiver of the Kansas Natural Gas Company, a permanent injunction against the defendants, appellants herein, to the same extent an effect as the injunction granted to plaintiff against these defendants, appellants herein, for the reason that said Receiver is not engaged in the business of interstate commerce, nor in the sale of natural gas in the State of Missouri."

### SPECIFICATION OF ERRORS.

1.—The court erred in holding that the sale in the Missouri cities of natural gas furnished by the Receiver is interstate commerce.

2.—The court erred in holding that the Public Service Commission of Missouri was without jurisdiction over the sale of natural gas by the local companies in Missouri cities.

3.—The court erred in holding that the suspension by the Public Service Commission of Missouri of schedules of rates for natural gas filed by the local companies in Missouri cities deprived the Receiver or

the local companies of their property without due process of law or denied them the equal protection of the laws.

4.—The court erred in holding that the suspension by the Public Service Commission of Missouri of schedules of rates, filed in Missouri cities by local companies, for natural gas furnished in Missouri cities by the Receiver, was an interference with or a direct burden upon interstate commerce.



**BRIEF.****I.**

**The sale and delivery of natural gas to consumers in the Missouri cities is not an interstate business, but local or domestic in its nature.**

The Kansas Natural Gas Company or its Receiver transports its own gas through its own system of pipes to the points near the Missouri cities, where it delivers the gas into the pipes of the respective local companies.

There is no legal relation between the Kansas Natural Gas Company or its Receiver and the consumers.

Under the terms of the supply contracts and under the course of dealing pursued by the Receiver, there is a point of space and of time when the gas leaves forever the possession and the ownership of the Natural Gas Company and comes into the ownership and possession of the local company. This is not affected by the fact that there is a continuous forward movement of the gas, nor does it on the other hand depend upon the fact that the local company may have holders in which gas is stored to meet unusual demands; nor, upon the fact that the pipes of the Natural Gas Company through compression of the gas in them, at certain times, constitute in some degree a storage system. It rests upon the fundamental relation that exists between seller and purchaser, after the seller has delivered the article to the purchaser.

"After the gas enters the mains of the Kansas City Gas Company, that Company has the actual physical

possession and complete control over it and over its distribution and sale. No gas is ever returned from the Kansas City Gas Company to the Kansas Natural Gas Company." (Page 813 of Record, par. 66.)

On one side of the line the molecule of gas is in process of interstate transportation. On the other it is localized by purchase, and by delivery, and by a possession which, under the dealings of the parties, is never to be reversed. It is inconceivable that gas which the Kansas Natural Gas Company, or the Receivers, have sold and delivered to the local company can maintain its interstate character in the possession of the local company when, by the terms of the transaction, the course of dealing of the parties, and the nature of the article dealt in, the Receivers have no lien upon it, no control over its disposition, no power to reclaim it, nor any right whatsoever, which inheres in the article itself. The right of the Receivers is the single right to have payment for gas delivered to the local company, according to a measure agreed upon between the Natural Gas Company and the local company.

This measure of the payment to be made, a percentage of the aggregate sum accruing from sales to consumers, at certain rates fixed by franchise ordinance, does not make the relation between the Receiver and the local Company that of principal and agent, nor cause the gas delivered into the possession of the local company to carry with it the characteristics of interstate commerce.

Upon this phase the decision in *Banker Brothers vs. Pennsylvania*, 222 U. S. 210, is applicable and authoritative.

The Banker Brothers Company was a corporation and engaged at Pittsburgh, Pennsylvania, in the sale of

automobiles. It obtained the automobiles from the Pierce Company, manufacturer, of Buffalo, New York. The Pierce Company agreed to make and sell to Banker Brothers Company automobiles at twenty per cent less than list price. Deliveries were to be made C. O. D., Buffalo, and payments were to be cash. The Banker Brothers Company could sell only within a restricted territory and upon terms stipulated by the manufacturer. The Banker Brothers Company took the order of a customer who paid a percentage of the list price. The order given by the purchaser was not addressed to the manufacturer, nor did the name of the Pierce Company appear in the order. The manufacturer, the Pierce Company, shipped the automobile to the Banker Brothers Company with draft for the remainder of the list price, less twenty per cent.

Continuing the subject, the language of the court, in its decision, 222 U. S. at page 213, is used, where it is said:

"The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which though shipped in interstate commerce had become at rest in the State of Pennsylvania. Banker Brothers Company had the title and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier v. Alabama*, 218 U. S., 124. The written contract was silent on the subject, but it was stipulated that the Pierce Company warranted the machine direct to the purchaser.

"It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction

between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.

"This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him and under the duty of paying to the State a tax on the sale.

"The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.

"These were mere incidents of the intra-state contract of sale between Banker Brothers Company and the purchaser in Pittsburgh, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. *See American Steel & Wire Co. v. Speed*, 192 U. S. 500; *American Express v. Iowa*, 196 U. S. 133, 146. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

In the case at bar, the gas is not paid for and by its nature cannot be paid for by the local company upon delivery. It is delivered pursuant to a contract or course of dealing whereby it is to be paid for later by the local company. But, the actual delivery is made, and when made is unconditional, absolute and beyond recall. This difference in method and physical fact and movement does not distinguish the case at bar from the case cited.

The actual physical delivery of the article with no right of recall but free to be redelivered in turn to the ultimate consumer, in either case, is the test whereby it is determined that the intermediate company, the local distributing company here, is a principal, and a vendor to the purchasing consumer. The natural gas involved, while by the nature of its molecules it may be in a material sense perpetually in

motion, yet in a legal sense, upon being delivered into the pipes of the local company, it "has become at rest in the State of Missouri."

The questions propounded by this court but not answered, because unnecessary to a decision of the case, in *Hall vs. Geiger-Jones Company*, 242 U. S. at page 558, concerning the securities affected by the "Blue-Sky" Law of Ohio, seem pertinent here, in view of plaintiff's contention that natural gas is moving in interstate commerce when it bursts into flame at the tip of the burner of the individual consumer.

This court, as above, propounded the queries: (Italics ours):

"We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the State. *We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the State?* Is there no point of time at which the State can expose the evil that they may mask? *Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the state only when they are attempted to be sold to the individual purchaser?*"

The evidence (Vol. II, page 813 et seq.) shows that the consumer in Kansas City, Missouri, who wants natural gas, applies to the local company, the Kansas City Gas Company. He has no dealings with the Receiver. His meter is furnished by and belongs to the local company. He begins to receive service within a few hours after his application is made. He is governed in all things by the rules of the local company. Like conditions prevail in the other Missouri cities.

Gas from the Kansas City Gas Company is separated and segregated by the Receiver from the whole volume of gas in the main pipe and turned into and delivered to the Kansas City Gas Company through its mains at 25th street and 39th street in Kansas City, Missouri. Thence separation and segregation of the volume in and entering the pipes of the local company is made to the individual consumer. For each consumer there is a point at which gas for his use is separated from the volume in the pipes.

Does the molecule of gas maintain one and only one unchanged and unchangeable legal relation to the Receiver from the time it enters the pipes in Oklahoma until it passes in flame through the burner of the consumer in Kansas City or Joplin?

## II.

**The characteristics and uses of natural gas, and the limitations surrounding its production, transportation and sale, make the business one incapable of uniform or natural regulation, but adapted to State supervision and regulation.**

The conclusions of the Supreme Court of Indiana upon this phase of the subject in *Jamieson vs. Indiana*

Natural Gas & Oil Co., 128 Ind. 555, rest upon a solid basis of fact and of reason. That court said:

"We affirm that natural gas is characteristically and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and peculiarities, it is a proper subject for state regulation, and cannot, so far as regards local production, be made the subject of general legislation by Congress, or, at all events, that it does not require a uniform system as between the states for its regulation."

The Supreme Court of Kansas, speaking of the same business as that now done by the Receiver, in *State ex rel. Caster vs. Flannelly*, 96 Kan. 372, said:

"Assuming that the sale of natural gas produced in Oklahoma, from there transported into this State through pipe lines and here sold to consumers throughout the State, is interstate commerce; it is not national in its nature; it does not admit of one uniform system of regulation; it is not that kind of interstate commerce which requires exclusive legislation by Congress, and until Congress acts it is under the control of this State."

The Supreme Court reaffirmed its adherence to this view in the more recent case of *State ex rel. Bristow vs. Landon*, 165 Pac. 1111.

Like views were held by the United States District Court for the Northern District of West Virginia in *Manufacturers' Light & Heat Company vs. Ott*, 215 Federal 940.



## III.

The peculiar qualities of natural gas and the marked and distinctive conditions under which it must be sold render governmental regulation thereof necessary; and the failure of Congress to undertake regulation compels the conclusion that meanwhile the subject is left to the respective states in which the business exists.

Failure of Congress to act upon the subject in hand means either that it is to remain free from all positive regulation, or that until Congress takes positive action, commerce in natural gas may be dealt with by the states respectively concerned.

By the provisions of the Interstate Commerce Act (U. S. Compiled Statutes, 1916, sec. 8563, 36 Statutes at Large, chap. 309, p. 544, sec. 7), Congress expressly excepted from the provisions of the Act the corporations or persons "engaged in the transportation \* \* \* of natural or artificial gas by means of pipe lines."

Natural gas occurs in only a small number of states, and in limited areas. The supply in a given territory is usually exhausted in a comparatively short time. It is a product of nature which is not reproduced. It can not be transported with profit for great distances. It can be transported only by means of pipe lines. It can not be sold to advantage except in large towns or cities. It can therefore only be sold profitably through or by companies holding franchises or permits to occupy and use the streets of cities for the purpose, and owning a plant of mains and distribution pipes located by consent of the city, and suitable for the sale and distribution of both natural and artificial gas. It comes into competition with domestic artificial

gas, or is sold in conjunction with it, as in the city of appellant, city of St. Joseph, Missouri. (Vol. II, page 816, par. 81, Record). It comes into competition for light, etc., with locally produced electric current in cities.

It is sold and, as a matter of practical business and concrete fact, can only be sold by a domestic a public service company, owing its existence to the state, and receiving its right to do business from the state through the state's agency, the municipal corporation, upon terms prescribed by the State, either directly or through its municipal agency by franchise or otherwise.

The rate at which it is sold to the consumer involves consideration not only of the value, or cost of production, at the wells, and of transportation from the wells, but of the cost of distribution at the place of consumption, and a proper return upon the investment of the local company.

The position here taken is, that upon the subject of commerce between the states not every failure of Congress to act is to be construed as leaving the particular subject free from state regulation, and as being an inhibition against state regulation, but, that each such subject, when occasion arises, is to be considered in accordance with its nature, and its relation to state, and interstate or Federal rights.

The contention of appellants is that the nature of the commodity, and of the circumstances under which the business in it is carried on leave it, in the absence of positive Federal regulation, among those subjects mitted to be dealt with by the States.

This court has frequently had occasion to consider closely the location in given instances of the line between the exclusive right of Federal regulation, and permitted State regulation. It is one not always easily discernible.

The question presented in this case is one with which this court has not heretofore been called to deal. The distinction must be drawn in accordance with the nature of the subject.

In the concurring opinion of Mr. Justice Field in *Bowman vs. Chicago etc. Ry. Co.*, 125 U. S. 465, l. c. 506, it is said:

"There is great difficulty in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. The same difficulty was experienced in *Brown v. Maryland*, in drawing a line between the restriction on the States to lay a duty on imports and their acknowledged power to tax persons and property. In that case the court said that the two, the power and the restriction, though distinguishable when they did not approach each other, might, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision, in marking the distinction between them; but as the distinction existed, it must be marked as the cases arise."

It needs neither argument nor citation of authority to support the statement that the furnishing of light and heat for the use of a city and of its inhabitants for public and domestic purposes is peculiarly a municipal problem. The solution is always founded upon the granting of a privilege monopolistic in character. The existence of municipal or State regulation, recognizing local needs and protecting local interests, is essential.

National, general or uniform regulation is impossible.

The discussion, in part, in the opinion of the court in *Wilmington Transp. Co. vs. California R. R. Commission*, 236 U. S. 151, sets forth the views attempted to be here expressed.

The California Railroad Commission had prescribed rates of transportation to be charged by the Transportation Company for a voyage from one port in California to another port in California, but which carried the vessel for a part of the voyage over the high seas, although without any landing being made between the point of starting and the destination.

The Transportation Company challenged the power of the State Railroad Commission. The court, 153, said:

"It is urged that the fixing of rates is a regulation of the commerce involved, and hence of necessity is repugnant to the Federal authority, although the latter be unexercised. This proposition, however, as has frequently been pointed out, is too broadly asserted if no regard be had to the differences in the subjects which, by virtue of the Commerce Clause, are within the control of Congress. Thus, vessels engaged in foreign commerce have been compelled to submit to state requirements as to pilotage and quarantine since the foundation of the government, although it could not be denied that these requirements were regulations which Congress could at any time displace. *Cooley v. Board of Wardens*, 12 How. 299, 317, 319; *Ex parte McNeil*, 13 Wall. 236, 240; *Wilson v. McNamee*, 102 U. S. 572; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195; *Morgan S. S. Co. v. Louisiana*, 118 U. S. 455, 465; *Compagnie Francaise v. Board of Health*,

186 U. S. 380, 387. In these cases it was apparent that the subject was of a local nature admitting of diversity of treatment according to local necessities, and it could not be supposed that it was the intention to deny to the States the exercise of their protective power, in the absence of Federal action. It is not necessarily determinative that the vessels in the course of the transportation in question pass beyond the boundary of the State. See *The Hamilton*, 207 U. S. 398, 405. In the case of ferries over boundary waters, it has always been recognized that ferriage from the shore of a State is peculiarly a matter of local concern and, while undoubtedly Congress may regulate interstate transportation by ferry as well as other interstate commercial intercourse, still, because of the nature of the transportation and the local exigency, a State in the absence of Federal regulation may prevent unreasonable charges for carriage by ferry from a point of departure within its borders. *Port Richmond Ferry v. Hudson County*, 234 U. S. 317, 332; *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 342. The rule which the plaintiff in error invokes is not an arbitrary rule, with arbitrary exceptions, but is one that has its basis in a rational construction of the Commerce Clause. As repeatedly stated, it denies authority to the States in all cases where the subject is of such a nature as to demand that, if regulated at all, its regulation should be through a general or national system, and that it should be free from restraint or direct burdens save as it is consti-

tutionally governed by Congress; and on the other hand, as to those matters which are distinctively local in character although embraced within the Federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the States, in order to meet the needs of suitable local protection, until Congress intervenes. *Cooley v. Board of Wardens, supra*; *Ex parte McNiel supra*; *Welton v. Missouri*, 91 U. S. 275, 280; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry v. Pennsylvania*, 114 U. S. 196, 204; *Bowman v. Chicago & C. Ry.* 125 U. S. 465, 481; *Minnesota Rate Cases*, 230 U. S. 352, 399-403; *Port Richmond Ferry v. Hudson County, supra*."

#### IV.

The orders of the Public Service Commission of Missouri for the suspension, pending investigation, of new schedules of rates above those fixed by contract by the companies concerned, was not an attempt at the taking of property without compensation, or without due process of law, nor a denial of the equal protection of the laws.

The presumption is that rates, fixed by competent legislative authority by direct enactment, or by delegated power upon a fair hearing, or fixed voluntarily by the Company or companies concerned by their agreement or otherwise and filed as such and permitted to stand by the rate-making body, as reasonable. Fuller Interstate Commerce, page 148, *Chicago, Milwaukee & St. Paul Ry. Co. vs. Tompkins*, 176 U. S. 167, and do not infringe the constitutional guarantees of protection of property.

Upon the filing of a proposed increase of such rates the burden of proof to show the reasonableness of the increase is upon the company proposing the increase, where the reasonableness of the increase is challenged by a competent body or interested party.

Minneapolis & St. Louis R. R. Co. vs. Minnesota, 186 U. S. 257.

Interstate Commerce Commission vs. Union Pacific Railroad Co. 222 U. S. 541.

The rate schedules filed by the local companies of Missouri cities other than Kansas City whose temporary suspension by the Missouri Commission under the provisions of Sections 69 and 70 (pages 59-60 appendix), of the Missouri Public Service Commission Law were complained of, were increases over rates fixed by contract between the cities, the local companies and the Kansas Natural Gas Company, which had been in force and were on file with the Commission.

The orders of suspension for 120 days, pending and for the purpose of an inquiry into the reasonableness of the proposed new rates, were not intended to be final, could have no other effect than to maintain temporarily the existing status while requiring the companies by evidence upon a full hearing to prove that the increase asked for was necessary and reasonable.

The court found (page 618 Vol. II Record) that the "Missouri Commission had made no orders fixing general rates for the sale of gas by the Receiver within the State of Missouri, as was the case in regard to the Kansas defendants." If therefore, the sale of gas to consumers by the local companies was not interstate commerce, or, if in the absence of action by Congress the power of regulation of the local companies in respect of natural gas remained with the State, the orders of

suspension did not invade any constitutional right or guarantee of protection of property of either the local companies or the Receiver.

The Missouri Commission could cancel the proposed new rate only upon a full hearing and upon competent evidence, whereby, and by review proceedings in court provided by the Missouri Public Service Commission law, all constitutional rights were preserved.

The fact that the Commission permitted the suspension orders to expire without proceeding to a hearing is not important, since the Commission while then and now asserting its right so to proceed, chose to let the issue be determined in this proceeding rather than, pending determination of the issue here, to deliberately invoke intermediate collateral action by the trial court.

### CONCLUSION.

The position of the Missouri Public Service Commission is, that the sale of natural gas to consumers is not interstate commerce. The gas enters the mains of the local companies in its original form, and composition, but, when it is passed through the governing or equalizing compressing stations of the local company and brought to the proper and uniform density and pressure for its safe passage through the intermediate pipes to the consumer, it has become a domestic article in every sense. Although it may, from its nature be continually in motion, it has been in a legal sense transformed. It lies on the counter of the local merchant, ready for sale, to the local customer, or consumer, having had done for it all that the retail merchant can do for the articles received for his store from a foreign state.



The rates and regulations apply to it after and only after it has thus been prepared by the local vendor for sale and actual consumption. The reduction of the original pressure, necessary for transportation, to the pressure necessary for consumption, is the breaking of the "original package."

In any event, the conditions of its sale imperatively demand governmental regulation.

And no other regulation is applicable or practical except that touching at the place of its ultimate use and consumption.

The court is respectfully asked to reverse the findings and orders of the District Court made and entered against the Missouri defendants.

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## APPENDIX.

Sections and parts of the Public Service Commission Law of the State of Missouri.

"Sec. 1. **Short Title.**—This act shall be known as the 'public service commission act,' and shall apply to the public service herein described and the commission herein created, and to the public service corporations, persons and public utilities mentioned and referred to in this act." (Laws 1913, p. 557.)

"Sec. 2, Sub-div. 10.—The term 'gas plant,' when used in the act, includes all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power." (Laws 1913, p. 558.)

"Sec. 2, Sub-div. 11.—The term 'gas corporation,' when used in this act, includes every corporation, company, association, joint stock company or association, partnership and person, there lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling, or managing any gas plant operated for public use under privilege, license or franchise now or hereafter granted by the state or any political sub-division, county, or municipality thereof." (Laws 1913, p. 558.)

"Sec. 2, Sub-div. 25.—The term 'public utility,' when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation and heat or refrigerating corporation,

as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act." (Laws 1913, p. 560.)

"Sec. 2, Sub-div. 26.—The term 'service,' when used in this act, is used in its broadest and most inclusive sense and includes not only the use and accommodation afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons." (Laws 1913, p. 560.)

"Sec. 2, Sub-div. 27.—The term 'rate,' when used in this act, shall mean and include every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges, rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof." (Laws 1913, p. 560.)

"Sec. 67. **Application of Article.**—This article shall apply to the manufacturing and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power and the generation, furnishing and transmission of electricity for light, heat or power, and the supplying and distribution of water for any purpose whatsoever." (Laws 1913, p. 602.)

**"Sec. 69. General Powers of Commission in Respect to Gas, Water and Electricity.—**The commission shall:

\* \* \* 12.—Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established and enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule of regulation relating to any rate, charge of service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation or municipality refund or remit in any

manner or by any device any portion of the rates or charges so specified, not to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time." (Laws 1913, p. 607.)

**"Sec. 70. Power of Commission to Stay Increased Rate.**—Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or municipality any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or municipality, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation, or practice, and pending such hearing and the decision thereon, the commission upon filing such schedule, and delivering to the gas corporation, electrical corporation, water corporation or municipality affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such

schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice, would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective: Provided, that if any such hearing cannot be concluded with the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rates is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation, or municipality, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." (Laws 1913, p. 608.)

**Sec. 111. Court proceeding for review.**—Within thirtydays after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of *certiorari* or review (hereinafter referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of

the original order or decision or the order or decision in rehearing inquired into or determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day the cause shall be heard by the circuit court, unless for a good cause shown the same be continued. No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon such hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly offered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. No court of this state, except the circuit court to the extent herein specified and the supreme court on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of the state shall always be deemed open for the trial of suits brought to review the orders and decisions

of the commission, as provided in this act, and the same shall be tried and determined as suits in equity.

**Sec. 112. Writ of review; bond to be given; excess charges of rates to be paid into court; additional bond may be required.**—The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision. No order so staying or suspending an order or decision of the commission shall be made by any circuit court otherwise than on three days' notice and after hearing, and if the order or decision of the commission is suspended the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that the great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage. In case the order or decision of the commission is stayed or suspended, the order or judgment of the court shall not become effective until a suspending bond shall first have been executed and filed with, and approved by the circuit court, payable to the state of Missouri, and sufficient in amount and security to secure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in the case such order or decision is sustained. The circuit court, in case it stays or suspends the order or decision of the commission in any manner affecting rates, fares, tolls, rentals, charges or classifications, shall



also by order direct the corporation, person or public utility affected to pay into the court, from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended. In case any circuit court stays or suspends any order or decision of the commission lowering any rate, fare, toll, rental, charge or classification, upon the execution and approval of said suspending bond, shall forthwith require the corporation, person or public utility affected, under the penalty of immediate enforcement of the order or decision of the commission (pending the review and notwithstanding the suspending order), to keep such accounts, verified by oath, as may, in the judgment of the court, suffice to show the amount being charged or received by such corporation, person or public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations and persons to whom overcharges will be refundable in case the charges made by the corporation, person or public utility, pending the review, be not sustained by the circuit court: *Provided*, that the street railroad corporations shall not be required to keep a record of the names and addresses of such persons paying such overcharge of fares, but such street railroad corporations shall give to such persons printed receipts showing such overcharges of fares, the form of such printed receipts to be approved by the commission. The court may, from time to time, require said party petitioning for a review to give additional security on,

or to increase, the said suspending bond, whenever in the opinion of the court the same may be necessary to secure the prompt payment of said damages or said overcharges. Upon the decision of the circuit court, all moneys which the corporation, person, or public utility may have collected pending the appeal, in excess of those authorized by such decision, together with interest, in case the court ordered the deposit of such moneys in a bank or trust company, shall be promptly paid to the corporations or persons entitled thereto, in such manner and through such methods of distribution as may be prescribed by the court, unless an appeal be granted such corporation, person or public utility, as hereinafter provided. If any such moneys shall not have been claimed by the corporations or persons entitled thereto within one year from the decision of the circuit court, or the supreme court, upon appeal, the circuit court shall cause notice to such corporations or persons to be given by publication, once a week for two successive weeks, in a newspaper of general circulation, printed and published in the city or county where the circuit court tried the cause, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notices shall be paid by the corporation, person or public utility, under the direction of the circuit court, into the state treasury for the benefit of the general revenue fund.

**Sec. 113. Preferences in all court proceedings.—**

All actions or proceedings under this or any other act and all actions and proceedings commenced or prosecuted by order of the commission, and all actions and proceedings to which the commission or the state may be parties, and in which any question arises under this or any other act, or under or concerning any order or deci-

sion or action of the commission, shall be preferred over all other civil causes except election contests in all the circuit courts of the state of Missouri, and shall be heard and determined in preference to all other civil business pending therein except election contests, irrespective of position on the calendar. The same preference shall be granted upon application of the general counsel for the commission in any action or proceeding in which he may be allowed to intervene.

**Sec. 111. Appeals to supreme court; transcript and exhibits; clerk to docket appeal at first term.—**

The commission, any corporation, public utility or person or any complainant may after the entry of judgment of the circuit court in any action in review, prosecute an appeal to the supreme court of this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this act. The original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the supreme court. Where an appeal is taken to the supreme court the cause shall, on return of the papers to the supreme court, be immediately placed on the docket of the then pending term by the clerk of said court and shall be assigned and brought to a hearing in the same manner as other causes on the then pending term docket, but shall have precedence over all civil causes of a different nature pending in said court. No appeal shall be effective when taken by a corporation, person or public utility unless a cost bond of appeal in the sum of five hundred dollars shall be filed within ten days after the entry of judgment in the circuit court appealed from. The

circuit court may in its discretion suspend its judgment pending the hearing in the supreme court on appeal, upon the filing of a bond by such corporation, person or public utility with good and sufficient security conditioned as provided for bonds upon actions for review and by further complying with all terms and conditions of this act for the suspension of any order or decision of the commission pending the hearing of review in the circuit court. This bond shall be in addition to the cost bond heretofore provided in this section. The general laws relating to appeals to the supreme court shall, so far as applicable and not in conflict with the provisions of this act, apply to appeals taken under the provisions of this act.